Supreme Court, U.S.
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92-234

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANK OF CUMBERLAND,
Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should provide guidance to the circuits on the proof necessary to establish a person as an "employee" under the coverage provisions of fidelity bonds because a split among the circuits now exists as to whether the elements of the employee definitions must be strictly and narrowly proved in order to permit enforcement of Fidelity Bonds. The unduly restrictive interpretation of the United States Court of Appeals for the Sixth Circuit of the term "employee' deprives insureds of reasonable expectations of insurance coverage.

II. Whether the Sixth Circuit abused its discretion and violated petitioner's right to jury trial when it failed to consider the evidence in the light most favorable to petitioner, failed to remand for new trial on the definitive issue of "employee" status consistent with the other circuits, and failed to preserve petitioner's right to move for a new trial in the District Court.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding before the Sixth Circuit were the following:

PLAINTIFF-APPELLEE-PETITIONER:

Bank of Cumberland

DEFENDANT-APPELLANT-RESPONDENT:

The Aetna Casualty and Surety Company

THIRD PARTY DEFENDANT IN DISTRICT COURT:

Myrtle S. Blakeley, Executrix of the Estate of Alton E. Blakeley, Deceased

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 11, 1992, a Petition for Rehearing having been denied by order of the Sixth Circuit entered on May 6, 1992.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported in Bank of Cumberland v. Aetna Casualty and Surety Company and Mrytle S. Blakeley, Executrix of the Estate of Alton E. Blakeley, deceased; et al., Case No. 90-6160 in the Sixth Circuit Court of Appeals, and a copy of the slip opinion appears in Appendix A hereto at 1a. The Memorandum Opinion of the United States District Court for the Western District of Kentucky on the jury verdict appears in

Appendix B hereto at 7a, and the District Court's Memorandum Opinion and Order denying Aetna's motion for judgment notwithstanding the jury's verdict appears in Appendix C hereto at 11a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on February 11, 1992, and an Order denying a petition to rehear was entered on May 6, 1992. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE POLICIES INVOLVED

United States Constitution Amendment VII:

> TRIAL BY JURY IN CIVIL CASES. In Suits at Common Law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law.

STATEMENT OF THE CASE

At the time this action arose in 1983, Petitioner Bank of Cumberland ("BOC") was insured under a Banker's Blanket Bond and an Excess Employee Dishonesty Bond (collectively the "Bonds") issued by the Aetna Casualty and Surety Company ("Aetna"). Appendix G at 21a and Appendix H at 50a. The Bonds contained Aetna's promise to indemnify BOC for losses resulting from dishonest or fraudulent acts of an employee. Appendix G at 24a. The Bonds defined employee at Section 1(f) of the Conditions and Limitations as an officer or other employee of the insured, while employed in, at or by any of the insured's offices or premises covered under the Bond. Ap-

pendix G at 32a.[1] The Bond at Section 2(d) of the Exclusions excluded coverage for losses resulting from the acts of any director other than one employed as a salaried official or employee, except when performing acts coming within the scope of the usual duties of an employee. Appendix G at 35a.

BOC had been purchased in equal shares by C. H. Butcher, Jr. ("Butcher") and Alton E. Blakeley ("Blakeley") in 1981. Butcher had been acquiring and managing banks since the 1970s, and had ownership interests in numerous banks in Kentucky and Tennessee ("Butcher banks"). Questionable practices of Butcher banks led to the closure of many Tennessee banks in May 1983. The combination of Butcher bank failures ranked in the top 10 of all time.

In 1980, Butcher hired Emmett J. Foster ("Foster"), a professional banker with approximately 15 years experience as bank board member, executive vice-president and president, to do consulting work for his banking interests. In 1982 and 1983, Foster was President of Butcher's flagship bank, The City and County Bank of Knox County, Tennessee ("CCK"), where he oversaw CCK's loans. During part of this time Foster also served as President of the City and County Interstate Financial

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[1] The Bonds at issue herein contain two distinct definitions of employee. In the Standard Form 24 issued by Aetna to Bank of Cumberland, employee is defined as "an officer or other employee of the Insured, while employed in, at or by any of the Insured's offices or premises covered hereunder . . .".

In contrast is the definition of employee in the Bond at issue in *Insurance Company of North America v. Greenburg*, 405 F.2d 330 (10th Cir. 1969), which defined employees as ". . . one or more natural persons . . . while in the regular service of the insured in the ordinary course of the insured's business during the term of this bond, and whom the insured compensates by salary, wages or commissions and has the *right to govern and control* in the performance of their services." (Emphasis added). *Id.* at 333.

This form of the definition specifies that the Insured must have the right to "govern and control" the employee. This language is not contained in the Bank of Cumberland Bond.

Corporation ("CNCIFC"), a management company owned 100% by Butcher which oversaw Butcher's businesses including but not limited to his banks. CNCIFC was involved in coordinating placement of loans among many Butcher banks including BOC.

Butcher hired Foster to be his representative at various banks, including BOC. Butcher made Foster a member of BOC's Board of Directors and Executive Committee between January 23, 1981 and May 14, 1981; and between August 12, 1982 and April 28, 1983. During his tenure, Foster attended many Board meetings on BOC's premises, and was the only member of BOC's Board of Directors who was paid a salary from which employee payroll taxes were withheld. All other members of the Board were paid flat director fees without any payroll deductions. Foster accepted his salary during the times he was employed by BOC. Foster recognized Blakeley and Butcher as co-equal partners at BOC, who together decided the structure and functions of BOC. Both Blakeley and Butcher recognized each other as co-equal partners in BOC, as did BOC's President Jim Meredith.

In Butcher banks such as BOC where Butcher was not a member of the Board of Directors, Butcher functioned through the President of the Bank.

As a result of his association with CCK, Butcher and numerous other banks in Kentucky and Tennessee, Foster was in a position of superior knowledge about certain East Tennessee borrowers who were friends and business associates of Butcher, many of whom had large loans at CCK. BOC perceived Foster as Butcher's right-hand man, employed by BOC to obtain good quality out-of-territory loans for BOC. BOC relied on Foster to evaluate the credit-worthiness of out-of-territory loans and ability of the borrowers to repay; and to recommend to BOC such loans and borrowers as he believed were justifiable, because they would be repaid. BOC regularly accepted Foster's recommendation without independently evaluating documentation of the out-of-territory loans.

Between January 1, 1981 and April 1, 1983, BOC made or renewed loans or participations (collectively "loans") which proved uncollectible far in excess of the policy limits of the Bonds. These loans had been booked or renewed based on 1) Foster's blanket representations that they were good loans, he knew the borrowers and they would be repaid; and 2) Foster's concealment of the deteriorating quality of CCK loans to the same borrowers and federal bank examiners' criticism of the borrowers and the loans.

In July, 1982, CCK was designated a "problem bank" by the Federal Deposit Insurance Corporation ("FDIC") due to poorly performing loans. FDIC discussed with Foster changes to improve the conditions at CCK and Butcher's banks; however, they continued to make risky investments and to deteriorate. Beginning November 1, 1982, the FDIC simultaneously examined many Tennessee Butcher banks to detect poor quality loans which were being shifted among Butcher banks in an effort to hide them from FDIC examiners at individual banks. Most of the out-of-territory loans at BOC were loans or participations to the same borrowers whose loans were being criticized at CCK. Foster knew and failed to disclose these problems to BOC. Had BOC known the status of these loans and/or borrowers, BOC could have refused to book or renew the loans, obtained additional collateral, or commenced collection actions.

BOC was rendered insolvent in May, 1983, as a result of the FDIC's requirement that BOC charge-off as losses the out-of-territory loans.

Loan files were thereafter turned over to BOC's attorneys for investigation of collateral value and collection efforts. After investigation, BOC's attorneys advised BOC President Meredith that these losses might be cognizable under the Bonds in that Foster's acts had apparently been dishonest and fraudulent with the manifest intent to cause BOC to sustain loss and to obtain benefit for

Butcher, his friends and business associates. On November 17, 1983, BOC gave letter notice to Aetna of its claims on the loan losses. A Proof of Loss and Supplemental Proof of Loss were filed with Aetna giving full particulars of the losses as required by the Bonds; and Aetna thereafter breached the Bond contracts and refused to indemnify BOC for those losses.

BOC sued Aetna for breach of its contractual promises under the Bonds. The jury observed the demeanor and considered the testimony of many witnesses and reviewed reams of evidence including 202 multi-part documentary exhibits during four and one-half months of intermittent days of trial.

At the close of BOC's proof in chief, the District Court denied Aetna's Motion for Directed Verdict on the issue of Foster's status as an employee of BOC under the Bonds. Aetna's renewed motion was again argued and denied at the close of the evidence in chief.

The jury was instructed on the factors to consider in determining whether Foster was an employee within the terms of the Bonds, including Foster's salary, employee designation at BOC, performance of duties consistent with those of an employee, acting with the direct authority of BOC, carrying out specific duties or functions at BOC, frequency of time spent on BOC premises and other matters deemed relevant to employee status. Appendix I at 70a.

After approximately five hours of deliberations, the jury returned a unanimous verdict that Foster was an employee within the terms of the Bonds who committed dishonest and fraudulent acts with the manifest intent to obtain benefit for himself, Butcher and his associates to the detriment of BOC, and awarded BOC $1,500,000.00 in damages, the policy limits of the Bonds.

Aetna's Motion for Judgment Notwithstanding the jury's verdict was denied. Appendix C at 11a.

The Sixth Circuit reversed and directed the District Court to enter judgment notwithstanding the jury's verdict for Aetna. Appendix D at 15a. This ruling was grounded solely on the Sixth Circuit's holding that BOC failed to adduce any evidence from which a jury could reasonably conclude that BOC controlled or could have controlled the activities of Foster. The Sixth Circuit did not mention any other evidence of Foster's employee status adduced at trial, and gave no consideration whatsoever to granting BOC a new trial. Appendix A at 1a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Provide Guidance To The Circuits On The Proof Necessary To Establish A Person As An "Employee" Under The Coverage Provisions Of Fidelity Bonds Because A Split Among The Circuits Now Exists As To Whether The Elements Of The Employee Definitions Must Be Strictly And Narrowly Proved In Order To Permit Enforcement of Fidelity Bonds. The Unduly Restrictive Interpretation Of The United States Court Of Appeals For The Sixth Circuit Of The Term "Employee" Deprives Insureds Of Reasonable Expectations Of Insurance Coverage.

The Sixth Circuit has reversed the trial court in all fidelity bond cases to come before it where the court was called upon to apply the elements for the definition of an "employee" to give effect to the coverage provisions of fidelity bonds. *William H. Sills Mortgages, Inc. v. Ohio Casualty Company*, 412 F.2d 341 (6th Cir., 1969); *Third Federal Savings and Loan Association of Cleveland v. Firemen's Fund Insurance Company*, 548 F.2d 166 (6th Cir., 1977) and the case now before this Court, *Bank of Cumberland v. Aetna Casualty and Surety Company*, 956 F.2d 595 (6th Cir., 1992). Fidelity bonds provide insurance coverage for losses sustained by the insureds from acts of their "employees" as defined under the provisions of each respective insurance contract. The bonds also provide other types of insurance coverage which are not relevant to this petition.

The Sixth Circuit in *William H. Sills Mortgages, Inc.*, without citing authority for its position, stated ". . . the principal test of an employer and employee relationship is control." *Id.* at 344. The court, however, determined that the findings of fact of the trial judge with reference to the employer and employee relationship were not clearly erroneous and that the person was an "employee" within the meaning of the bond. The Sixth Circuit thereby established its own rule, absent cited *Stare Decisis*, on the essential element of proof necessary to meet the employee definition test to permit the enforcement of fidelity bonds, where losses are attributed to acts of employees.

The Sixth Circuit was again confronted with the elements of proof necessary to establish a person as an employee under a fidelity bond in *Third Federal Savings and Loan Association of Cleveland.* The Sixth Circuit revisited the evidentiary trail on the issue as to whether the person was an employee. The person in question was an appraiser engaged by the insured to undertake certain real estate appraisals as a part of the loan process. He was paid an agreed sum for each appraisal and each inspection which were undertaken on behalf of the insured. The inspection report was on a form prepared by the Association. There was no testimony that the appraiser was given any instructions other than the date his report was required. The appraiser was paid once or twice per month on the submission of statements to the insured, listing the appraisals and inspections for which payment was expected. He was never furnished an employee's withholding statement. The Association did not withhold income taxes or deduct Social Security employee contributions from his pay and made no Social Security employer contributions on his behalf. He was not listed as an employee of the Association for purposes of Worker's Compensation or unemployment insurance. Testimony was elicited at trial from the secretary of the Association that the appraiser was not listed on the application for insurance coverage ". . . because he was not considered an

employee". *Id.* at 169. The Sixth Circuit again enunciated its position that the "principal test" of an employer and employee relationship was control, citing its decision in *William H. Sills Mortgages, Inc.*, *Id.* at 170. The court observed that the record was absent substantial evidence that the insured exercised or claimed the right to exercise control over the manner in which the appraiser carried out the inspections. *Id.* at 171. The court concluded that in reviewing the entire evidence of the case it was left with a definite and firm conviction that a mistake had been committed by the trial court. On this reasoning the Sixth Circuit reversed the United States District Court for the Northern District of Ohio, held that the appraiser was not an "employee" within the meaning of the bond, and denied coverage. *Id.* at 171.

The Sixth Circuit was next confronted with the case subjudice, Bank of Cumberland, in which it ultimately held that BOC was obligated to introduce evidence that control and/or influence was exerted over Foster, the person BOC centends was an employee for purposes of invoking coverage under the Bonds. *Id.* at 597. Recognizing that Butcher held a 50% ownership interest in BOC and simultaneously owned 100% and controlled CNCIFC, the Sixth Circuit summarized the facts below as follows:

> "Butcher appointed his friend Emmett J. Foster . . . to serve as his representative on BOC's Board of Directors. Foster was a member of the BOC Board of Directors and Executive Committee from January 23, 1981 to May 14, 1981; and from August 12, 1982 through mid 1983. During this time Foster was also president of City and County Interstate Financial Corporation ("CNCIFC"), which contracted to make credit and management decisions for BOC and other Butcher banks from November 11, 1982 through March 31, 1983. As president of CNCIFC, Foster matched loan requests with participating Butcher banks based on such factors as loan demands, risks,

> and the financial situation of the particular bank. BOC regularly accepted Foster's recommendations for booking and renewing loans from out of territory borrowers, and typically did so without reviewing in advance loan documents or file financial information." *Id.* at 596.

The court further recited that "Foster's apparent intent was to cause BOC to sustain losses and to obtain benefit for Butcher, his friends, and his business associates. *Id.* at 597. The Sixth Circuit did not recite any other indicia of employment which are cited in the Statement of the Case of this Petition, but concluded that ". . . thus, the relationship between Foster and Butcher is not determinative of the relationship between Foster and BOC". *Id.* at 598. The Sixth Circuit failed to mention or consider the jury instruction regarding Foster's functions as President of CNCIFC at Appendix I at 70a hereof, but focused its entire attention upon the question of whether BOC produced evidence of its ability to supervise Foster. Apparently relying on its determination that the relationship between Foster and Butcher was not or could not be determinative in any respect on the relationship between Foster and BOC, the Sixth Circuit invaded the province of the jury and eviscerated its ability to weigh the evidence and conclude that any supervisory authority could have come from Butcher or Blakeley sufficient to satisfy the court's "control" requirement to trigger coverage under the Bonds. The Sixth Circuit again invaded the province of the jury and denied the jury and leeway to conclude from the other evidence that it heard, including the elements of the employer-employee relationship which are recited in the Statement of Case to this Petition, that Foster was an "employee" within the meaning of the Bond. The Sixth Circuit then held ". . . therefore, a reasonable jury could only conclude that Foster acted as an independent contractor for BOC through the services of CNCIFC and not as an "employee" of BOC as required under the bond." On that sole basis, the Sixth Circuit re-

versed the jury's verdict and directed that Aetna's motion for JNOV be granted. *Id.* at 598.

In the two fidelity bond insurance cases in which the Sixth Circuit has confronted bond language defining an employee, and the requisite proof to establish employee status, it has required affirmative direct evidence of the "right to control" to be presented by the insured to meet the threshold issue of recoverability under a fidelity bond. In so doing, the Sixth Circuit apparently concludes that proof of any of the other elements of employee status is meaningless, absent affirmative direct proof of "right to control". This "right to control" requirement was imposed by the Sixth Circuit despite the less than precise language in insuring contracts such as the contract at bar which defines employee as ". . . an officer or other employee of the insured while employed in, at, or by any of the insureds offices or premises covered hereunder . . ." Appendix G at 32a. The Bond at bar excluded coverage for any ". . . loss resulting directly or indirectly from any acts of any director of the insured other than one employed as a salaried, pensioned or elected official or an employee of the insured, except when performing acts coming within the scope of the usual duties of an Employee. . .". Appendix G at 35a. The Bonds at bar contrasted with other types of bonds described at footnote 1 of this Petition do not include the important word "control"; however, the Sixth Circuit has established its own rule in requiring not only that control be a principal test to establish the employer-employee relationship but the *only* element of proof to establish that relationship. These decisions trace their heritage back to *William H. Sills Mortgages, Inc.* *Id.* at 344.

The highly restrictive position of the Sixth Circuit is in direct conflict with the position other circuits have taken in dealing with cases with similar facts and similar, if not more restrictive, insuring agreements. This clear conflict among the circuits mandates the intervention of.

the Supreme Court and the exercise of its supervisory powers in applying the standards for enforcement of fidelity bonds.

The Fifth Circuit has dealt with a case strikingly similar to *Bank of Cumberland* in *Federal Deposit Insurance Corporation v. Aetna Casualty and Surety Company*, 426 F.2d 729 (5th Cir., 1970). Aetna and other insurance carriers issued bankers blanket bonds in favor of The First National Bank of Marlin, Texas which later failed, with its interest being assumed by FDIC. The bankers blanket bond contained the standard provisions excluding coverage for losses resulting from any act or acts of directors other than one employed as a salaried employee or elected official of the insured. The two (2) principal shareholders of the bank had elected their agent to the Board of Directors of the bank, however the agent held no other official capacity with the bank. Through a convoluted series of events, orchestrated by the principal owners of the bank through their agent director, the bank's Board of Directors passed a resolution authorizing a transaction which ultimately resulted in a loss of $408,362.97.

Following the bank's failure a claim was filed on the bond contending that the agent was an "employee" for purposes of invoking coverage under the insuring contract. The trial court concluded that the agent's acts came within the scope of the usual duties of an employee of the bank, that his acts in connection with the transaction were dishonest and fraudulent and therefore the losses were covered by the bond. Aetna and the remaining insurance carriers argued that the bond did not cover the agent's acts because his acts came within the usual scope of a director. The Fifth Circuit disagreed with the insurance companies and determined that because the "employee" was acting as an emissary of the principal owners of the bank, and because he took on more responsibility than a typical director would have undertaken, the

bond provided coverage for his actions. In contrast to the Sixth Circuit's highly restrictive position in *Bank of Cumberland* and *Third Federal Savings and Loan Association*, the Fifth Circuit takes a far more pragmatic approach to interpreting the bond language defining employee status. The facts in *Third Federal Savings and Loan Association*, were strikingly similar to those at bar. Persons with controlling interest placed their emissary within the Bank as a director who in turn orchestrated a series of loans which result in losses for the bank but gains for the principal shareholders. The names are virtually interchangeable as between these two cases yet entirely different conclusions were reached by the Fifth Circuit as contrasted with the Sixth Circuit.

An even more striking contrast to the highly restrictive Sixth Circuit position is found in the Seventh Circuit in *Charm Promotion, Ltd. v. The Travelers Indemnity Company*, 447 F.2d 607 (7th Cir., 1971). This case involved a claim on a fidelity bond with similar language to a bankers blanket bond dealing with the definition of "employee". However, in *Charm Promotion, Ltd.*, the definition of employee was even more restrictive than in any of the previous cases discussed, including *Bank of Cumberland*:

> ". . . any person (except a director or trustee of the insured, of a corporation, who is not also an officer or employee thereof in some other capacity) while in the regular service of the insured in the ordinary course of insured's business during the policy and whom an insured compensates by salary, wages, or commissions and *has the right to govern and direct* in the performance of such service". (Emphasis added.) *Id.* at 609.

A group of individuals and corporations formed the corporation known as Charm Promotion Ltd. and designated as officers two (2) principal owners of the corporation. Later it was discovered that the two (2) officers were improperly diverting Charm's funds for their

own use and a claim was filed on the fidelity bond. The two (2) named individuals claimed that they were not employees within the meaning of the bond and the District Court found in favor of the insurance company, determining that the individuals did not meet the employee definition of the bond. Travelers asserted that the individuals never performed services for or had employment with Charm, were never paid wages, but actually considered themselves as serving in the capacity of being partners in the ownership of Charm. Checks had been made payable to the named officers by the corporation but both individuals testified that the payments represented nothing more than distributions of income.

The Seventh Circuit reversed the trial court's decision on the employee issue, concluding that each of the elements of the employee definition need not be fulfilled "*strictly and narrowly*" in order to provide insurance coverage. *Id.* at 611. Concluding that it is sufficient that those persons claimed to be employees be engaged in the "course of employment," the Seventh Circuit determined that the essential "employee" element under the bond had been met. *Id.* at 611.

Travelers also asserted in its motion for Summary Judgment in the trial court that Charm had no right to "govern and direct" the two (2) named employees in the performance of their duties. Proof was presented at trial that Charm was to function as a joint venture, that each respective ownership group had a right to name three (3) directors of Charm, and that as a result of this mechanism the board had no right to govern or direct the two (2) individuals who were named as officers of the corporation and who had perpetrated the loss. The Seventh Circuit dismissed this argument, stating that the individuals had undertaken certain responsibilities on behalf of the corporation and were responsible to the Board of Directors as such and therefore were legally subject to their control. If the corporation had the right to control

its employees then it possessed the authority to "govern and direct" and the Travelers' argument was of little consequence. The Seventh Circuit therefore concluded that the test had been met to present these questions to the trier of fact. *Id.* at 612. The Sixth Circuit's restrictive interpretation of employee status contrasted with the far more expansive interpretation permitted by the Seventh Circuit cries out for intervention by this Court.

The Ninth Circuit in *Federal Deposit Insurance Corporation v. New Hampshire Insurance Company*, 953 F.2d 478 (9th Cir., 1991) also addressed the "employee" definition in a fidelity bond following losses sustained by a savings and loan association resulting from dishonest or fraudulent acts committed by its former president, director and sole shareholder. The FDIC was the successor in interest to a failed savings and loan association located in California. The bond held by the FDIC defined an employee as "an officer or other employee of the insured while employed in, at, or by any of the insured's offices or premises covered hereunder." *Id.* at 482. The New Hampshire Insurance Company argued that because the named individual was a sole shareholder, in fact no right to control existed beyond a shareholder, and therefore by definition the sole shareholder was excluded from coverage as an employee of the insured. The Ninth Circuit specifically contrasted the language of this bond with the more restrictive language of those bonds which define an employee as a person who the insured ". . . has the *right to govern and direct* in the performance of their service" (Emphasis added.) The Ninth Circuit construed this to be a special limitation on the definition of the term "employee," and absent that special restriction a more expansive reading of the term "employee" was appropriate and in fact fell within the plain meaning of the broader interpretation of the term. *Id.* at 482.

BOC's bond also contains the less restrictive definition of employee. Wholly absent from the definition is any

requirement of the "right to govern and control." The Sixth Circuit did not acknowledge the absence of the requirement of control from the bond, but instead attached extraordinary significance to the "control issue" and required affirmative direct proof of a factor wholly absent from the bond. No recitation of the bond definition for employees is found in *Third Federal Savings and Loan Association of Cleveland.*

The Ninth Circuit also attempted to apply general principles of federal law in the interpretation of the contract as a result of the United States being a party to the agreement. *Id.* at 481. In so doing, the court was permitted to draw on all sources of common law in reaching its conclusion. *Id.* at 481. The Ninth Circuit summarized its rules of construction in contract cases under federal law in determining that a contract must be construed broadly, with reference to the whole, preference being given to reasonable interpretations as opposed to the unreasonable, that a dispute in contract meaning does not necessarily mean that the contract is ambiguous and that a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation. *Id.* at 481. In applying these standards, and in determining that the definition of the term "employee" had been met by the insured, the court applied a far less stringent standard to the proof required to establish employee status than the restrictive position taken by the Sixth Circuit. In *Federal Deposit Insurance Corporation v. The New Hampshire Insurance Company*, the court left the ultimate determination of whether or not an employee status existed to the trier of fact, a position clearly conflicting with the Sixth Circuit which invaded the jury's province, weighed the evidence and made its own determination on a factual issue, even after a jury had heard the proof offered by the BOC and Aetna during a trial which lasted for over four and one-half (4½) months and in which hundreds of exhibits and dozens of witnesses were presented to the jury for their consideration.

The Tenth Circuit in *Insurance Company of North America v. Greenburg*, 405 F.2d 330 (10th Cir., 1969), also has been confronted with the employee status issue under a "blanket honesty bond." That bond contained far more restrictive language than in the Sixth Circuit cases. The insurance contract provided that an employee was

> one (1) or more natural persons (except directors or trustees of the insured, of a corporation, who are not also officers or employees thereof in some other capacity) while in the regular service of the insured in the ordinary course of the insured's business during the term of this bond, and whom the insured compensates by salary, wages or commissions and has the *right to govern and direct* in the performance of their services. (Emphasis added.) *Id.* at 333.

Claims were made in that case under a bond as a result of fraud perpetrated by a director and secretary of the insured. These acts consisted of the assignment of fictitious accounts, substitution of accounts, commingling of funds collected on behalf of the claimants, misappropriation of funds for direct corporate use and indirect employee benefits, and false reporting to the claimants of certain collections. The Insurance Company of North America argued that the two (2) persons were not "employees of the company," asserting that they "governed" rather than being governed by the corporation. The Tenth Circuit rejected the insurance company's arguments and concluded that if the issue of control could conceivably lie with someone other than the employees, then coverage would exist under the policy. *Id.* at 333. The Tenth Circuit did not require affirmative proof of the existence of control, but simply determined that control *could* have existed as a result of the nature of the business relationship between the employees and the company. The court determined in essence that the named persons were also controllable by the ownership of the corporation and therefore theoretical "control" could exist sufficient to present the matter to the trier of fact. This

is a far more practical interpretation of the term "employee" under fidelity bonds than the highly restrictive and narrow interpretation of the Sixth Circuit.

The conflict among the circuits resulting from the highly restrictive and narrow interpretation of the Sixth Circuit, when contrasted with the decisions of the Fifth, Seventh, Ninth and Tenth Circuits, is even more exacerbated by the banking crisis which exists across the United States which has resulted from the insolvency of financial institutions. If the more narrow and restrictive interpretation for recovery under the employee defalcation provisions of bankers blanket bonds is allowed to stand, as enunciated by the Sixth Circuit, then these bonds will be rendered of little protection to the banks they insure beyond simple embezzlement claims or the other far more simplistic types of losses experienced by financial institutions. But if in fact the surety contracts are to be construed more strongly against the insurance company and more favorably for the insured, as is the typical insurance contract standard of interpretation, then the Sixth Circuit decision strips insureds of their reasonable expectations of insurance coverage.

If the more narrow interpretation of the Sixth Circuit is to be the rule, then the bankers blanket bond contracts purchased by most financial institutions in the United States (the standard form 28 and 24 contracts), provide little coverage to the financial institutions and more importantly their successors in interests upon the insolvency of those institutions.

II. The Sixth Circuit Abused Its Discretion And Violated Petitioner's Right To Jury Trial When It Failed To Consider The Evidence In The Light Most Favorable To Petitioner, Failed To Remand For New Trial On The Definitive Issue Of "Employee" Status Consistent With The Other Circuits, And Failed To Preserve Petitioner's Right To Move For A New Trial In The District Court.

The Bonds BOC purchased from Aetna provided coverage for losses resulting from fraudulent or dishonest acts of BOC employees. The Bonds defined "employee" as ". . . an officer or other employee of the insured while employed in, at, or by any of the Insured's offices or premises . . . ." Furthermore, under the heading of "EXCLUSIONS," the Bonds provided that coverage was excluded for the following:

> "loss resulting directly or indirectly from any acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the Board of Directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of Insured. Appendix G at 32a.

At trial, the jury heard evidence that Butcher hired Foster to work at BOC; that both Butcher and Blakeley, the bank's owners, considered Foster to be an employee of BOC; that Foster was Butcher's representative at BOC; that Foster was a member of the Board of Directors at BOC; that Foster was appointed to the Executive Committee at BOC; that Foster had special responsibility for evaluating out-of-territory loans and making recommendations to BOC regarding such loans; and that, unlike the other directors, Foster was paid a salary and employment taxes were deducted from that salary. Upon considering the foregoing evidence, and the District Court's instruction on the "employee" status issue (Appendix I at

70a); the jury found that Foster was indeed an "employee" of BOC.

In considering the District Court's denial of Aetna's motion for judgment notwithstanding the verdict, the Sixth Circuit was bound by the same standard of review as was the District Court. The Sixth Circuit was required to consider the evidence presented at trial in the strongest possible light in favor of BOC and to give BOC the advantage of every fair and reasonable inference which could be drawn from the evidence. Further, the Sixth Circuit was precluded from reversing the denial of Aetna's motion unless there was a complete absence of proof on the issue of "employee" status. *J. C. Wyckoff and Asso. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1482 (6th Cir., 1991); *Taylor v. Kennedy*, Ky. App., 700 S.W.2d 415, 417 (1985).

The evidence regarding Foster's status at BOC, when properly considered, is clearly sufficient to support the jury's finding that he was an "employee" of BOC. The owners of BOC considered Foster an employee, Foster performed duties at BOC, Foster was paid a salary for the performance of his duties, and BOC withheld employment taxes from Foster's salary. Furthermore, the actions taken by Foster as a salaried member of the Board of Directors and Executive Committee were unquestionably "within the scope of the usual duties of an Employee."

The Fifth Circuit, in *Federal Deposit Insurance Corporation v. Aetna Casualty and Surety Company*, *id.*, construed coverage provided by a fidelity bond containing the same exclusions found in the bonds purchased by BOC. The Fifth Circuit held that:

> ". . . it is apparent a general rule is established by the exclusion clause in question that the bond does not cover the loss resulting from the act of a director of the Insured unless he is 'employed as a salaried, pensioned or elected official or Employee of the In-

> sured.' The remainder of the clause, however, establishes an exception to this general rule so that if a director is 'performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the Board of Directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured,' those acts are within the coverage of the bonds." *Id.* at 736-737.

In *FDIC Aetna*, it was conceded that the individual who had assisted the bank in acquiring notes he knew to be of poor quality was not an officer, clerk or employee of the bank and did not take part in day-to-day operations of the bank. Nevertheless, the Fifth Circuit found that the individual's actions in acquiring the notes for the bank were within the scope of the usual duties of an employee and that, therefore, the losses suffered by the bank were covered under the bond. Not only does the evidence presented at the trial in this case support a finding that Foster was a salaried employee of BOC, it unquestionably established that Foster was performing acts coming within the scope of the usual duties of an employee when he advised BOC regarding its acquisition out-of-territory loans.

The Sixth Circuit clearly failed to apply the proper standard of review when considering the denial of Aetna's motion for judgment notwithstanding the verdict and, instead, simply chose to substitute its judgment for that of the jury. Rather than applying the test for "employee" status utilized by the District Court, other circuits and the courts of Kentucky, the Sixth Circuit chose to focus solely on the element of "control" and to substitute its judgment for the jury's on that element. It was the jury that heard the evidence and acted as the fact-finding party, and the Sixth Circuit was not free to re-weigh the evidence and to set aside the jury's verdict merely because it drew different inferences or reached different conclusions. *See, Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401 (8th Cir., 1976). In failing to consider the

evidence in the strongest possible light in favor of BOC and in failing to grant BOC the advantage of every fair and reasonable inference which could be drawn from the evidence, the Sixth Circuit abused its authority and deprived BOC of its Seventh Amendment right of trial by jury.

The Sixth Circuit compounded its error when it failed to grant BOC a new trial on the "employee" status issue or preserve BOC's right to move the District Court to rule on a motion for new trial regarding that issue. Despite applying a test for determining "employee" status not utilized by the District Court, other circuits, or the courts of Kentucky, the Sixth Circuit failed to grant BOC a new trial on that issue. Indeed, there is no indication in its opinion that it even considered the issue of a new trial. Furthermore, the Sixth Circuit failed to remand the case to the District Court with directions for it to consider new trial issues. Instead, the Sixth Circuit simply directed the District Court to enter judgment for Aetna.

This Court has long held that the determination of whether a new trial should be granted calls for the judgment in the first instance of the judge who conducted the trial and that a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. *See, Cone v. West Virginia Pulp and Sign Paper Company*, 330 U.S. 212 (1947); *Globe Liquor Company v. San Roman*, 332 U.S. 571 (1948); *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949). The District Court in the case at bar was intimately familiar with the evidence presented at trial and had properly instructed the jury on the various factors to be considered in determining whether Foster was an "employee." The District Court was clearly in the best position to determine whether BOC should be granted a new trial on the "employee" issue and it should have been given the opportunity to do so.

Pursuant to FRCP 59(d), when a motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion *may*, as appellee, assert grounds entitling it to a new trial in the event the court of appeals reverses the denial of that motion. FRCP 50(d) merely permits the verdict winner as appellee to ask the court of appeals for a new trial; it clearly does *not* provide that a verdict winner *must* do so in order to protect his right to a new trial. BOC had the right to have the District Court consider a motion for new trial based upon its familiarity with the evidence. When the Sixth Circuit remanded this case with directions to simply enter judgment for Aetna, it derpived BOC of its right to move the District Court for new trial. *See, Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 324 (1967). The Sixth Circuit's failure to grant BOC a new trial and its failure to preserve BOC's right to present a motion for new trial to the District Court not only constitute an abuse of discretion, but deprive BOC of the right of trial by jury in contravention of Seventh Amendment to the United States Constitution.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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August, 1992

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-6160

BANK OF CUMBERLAND,
Plaintiff-Appellee,

v.

AETNA CASUALTY AND SURETY COMPANY,
Defendant and Third Party Plaintiff-Appellant,

MYRTLE S. BLAKLEY, Executrix of the Estate of ALTON E. BLAKLEY, deceased; *et al.*,
Third Party Defendants.

On Appeal from the United States District Court
for the Western District of Kentucky

Decided and Filed February 11, 1992

Before: NELSON and SUHRHEINRICH, Circuit Judges; and HARVEY, Senior District Judge.*

SUHRHEINRICH, Circuit Judge. Defendant Aetna Casualty and Surety Company ("Aetna"), appeals the

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* The Honorable James Harvey, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

jury verdict for plaintiff, Bank of Cumberland ("BOC"), in this diversity insurance action. Specifically, Aetna argues that the district court erred in failing to grant Aetna's motion for judgment notwithstanding the verdict ("JNOV"). For the reasons that follow, the judgment entered below is REVERSED.

I

C.H. Butcher, Jr. owned a large number of banks throughout Kentucky and Tennessee (collectively "Butcher Banks"). In 1981, he and Alton E. Blakley purchased equal shares in BOC. Blakley became chairman of the BOC board of directors.

On December 9, 1981, BOC purchased a Bankers Blanket Bond and an Excess Bank Employee Dishonesty Bond (collectively "the bonds") from Aetna, by which Aetna promised to indemnify BOC for losses resulting from fraudulent and dishonest acts of BOC employees discovered during the period of coverage.[1] In order to recover under the bonds, BOC is required to prove that the individual who caused the loss is an "employee" of BOC. The bonds define an employee as "an officer or other employee of the insured while employed in, at, or by any of the Insured's offices or premises covered hereunder . . . ." The bonds specifically exclude from coverage any "loss resulting directly or indirectly from any acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured . . . ."

Also in 1981, Butcher appointed his friend Emmett J. Foster, the individual BOC claims caused its losses, to serve as his representative on BOC's board of directors. Foster was a member of the BOC board and executive

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[1] The parties agree that the "Bankers Blanket Bond" and the "Excess Fidelity Bond" impose the same requirements with regard to the provisions at issue here.

committee from January 23, 1981 to May 14, 1981; and from August 12, 1982, through mid-1983. During this time Foster was also president of the City and County Interstate Financial Corporation ("CNCIFC"), which contracted to make credit and management decisions for BOC and other Butcher Banks from November 11, 1982 through March 31, 1983. As president of CNCIFC, Foster matched loan requests with participating Butcher Banks based on such factors as loan demands, risks, and the financial situation of the particular bank. BOC regularly accepted Foster's recommendation for booking and renewing loans from out-of-territory borrowers, and typically did so without reviewing in advance loan documents or file financial information.

In mid-1982, some of the Butcher Banks began to experience financial problems. In late October and early November of 1982, a number of these banks were subjected to simultaneous examinations by the Federal Deposit Insurance Corporation ("FDIC"). The purpose of these simultaneous examinations was to identify loans which had evaded individual examinations by being "shifted" among the Butcher Banks.

In late February 1983, the FDIC notified BOC of charges against it as a result of the out-of-territory loans, and that the FDIC would seek a cease-and-desist order against BOC. On March 2, 1983, state and federal regulators met with BOC's board of directors to address BOC's situation. On April 15, 1983, the FDIC again sent a letter to BOC attacking its lending practices.

The FDIC conducted another examination of BOC on April 29, 1983 and discovered further deterioration in the credit quality of BOC's loan portfolio. In May 1983, BOC became formally insolvent as a result of the need to charge off as losses the out-of-territory loans. After investigation, BOC's attorneys concluded that the losses suffered by BOC might be cognizable under the bonds because Foster's acts apparently were dishonest and fraudulent.

Foster's apparent intent was to cause BOC to sustain losses and to obtain benefit for Butcher, his friends, and his business associates. On November 17, 1983, BOC gave letter notice to Aetna of its bond claims on the loan losses.

On January 18, 1985, BOC sued Aetna, asserting that Foster's conduct was atcionable under the bonds. The jury returned a verdict in favor of BOC, concluding, *inter alia*, that: (1) Foster was an "employee" of BOC; (2) Foster's failure to inform BOC's board of information concerning the disputed out-of-territory loans was a "dishonest or fraudulent" act within the meaning of the bond; and (3) BOC promptly notified Aetna of the claim. BOC was awarded $1,500,000 plus interest. Shortly thereafter, Aetna filed a motion for JNOV or for a new trial, both of which the district court denied. This appeal followed.

II

Aetna raises numerous arguments on appeal, but we need consider only one. Aetna contends that Foster was not an employee of BOC and therefore the district court erred in denying its motion for JNOV, brought under Fed. R. Civ. P. 50(b). Specifically, Aeta argues that BOC failed to present sufficient evidence that BOC controlled or could have controlled Foster's activities on its behalf. Aetna's theory is that Foster, as an employee of CNCIFC, acted as an indepedent contractor for BOC and not as an employee.[2]

In federal diversity cases, this court adheres to the rule that motions for directed verdicts and judgments notwithstanding the verdict are governed by state law. *J.C.*

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[2] It is well established that an independent contractor may act with the direct authority of another and carry out specific duties for another without being an "employee." *See King v. Shelby Rural Elec. Cooperative Corp.*, 502 S.W.2d 659, 663 (Ky. 1973), *cert. denied*, 417 U.S. 932 (1974).

Wyckoff & Asso. v. Standard Fire Ins. Co., 936 F.2d 1474, 1482 (6th Cir. 1991). In evaluating a JNOV under Kentucky law a trial court is required to consider the evidence in the strongest possible light in favor of the party opposing the motion and must give the opposing party the advantage of every fair and reasonable inference that can be drawn from the evidence. *Taylor v. Kennedy*, 700 S.W.2d 415, 417 (Ky. App. 1985).

BOC concedes that control is a necessary element in establishing that Foster was an employee under the bonds. *See Kentucky Farm Bureau Mutual Ins. Co. v. Snell*, 319 S.W.2d 462, 465 (Ky. 1958); *Blair v. Boggs*, 265 S.W.2d 795, 796 (Ky. 1954). *See also Third Federal Sav. and Loan Ass'n v. Fireman's Fund Ins. Co.*, 548 F.2d 166, 171 (6th Cir. 1977) (in considering a bond similar to the one at issue here, this court noted that the "right to control is the hallmark of an employer-employee relationship"); *William H. Sill Mortgages v. Ohio Casualty Ins. Co.*, 412 F.2d 341, 394 (6th Cir. 1969) ("[t]he principal test of an employer and employee relationship is control."). In order to satisfy its burden, BOC introduced evidence that Butcher, who was a part owner of BOC, exerted control and/or influence over Foster. Butcher testified by deposition that he "hired" and "employed" Foster and that he voted Foster onto the Board of Directors of several of his banks, including BOC, to represent his interests.

The fact that Foster was controlled by Butcher, however, does not necessarily establish that Foster was an employee of BOC, which was a separate legal entity from Butcher. *See Holsclaw v. Kenilworth Ins. Co.*, 644 S.W.2d 353, 355 (Ky. App. 1982) (a corporation is normally considered a distinct entity from its shareholders, officers and directors); *White v. Winchester Land Development Corp.*, 584 S.W.2d 56 (Ky. App. 1979) (courts are reluctant to disregard the corporate entity). Butcher's ownership of BOC is relevant only if Butcher acted as a manager or officer of BOC, *see HarBel Coal Co. v. Asher Coal Min.*

Co., 414 S.W.2d 128 (Ky. App. 166); or was somehow an "alter ego" of BOC. *See White*, 584 S.W.2d at 60-62. It is undisputed in this record that Butcher was not an officer or manager of BOC. Further, there is no basis for finding, nor has BOC alleged, that Butcher was the alter ego of BOC.[3] Thus, the relationship between Foster and Butcher is not determinative of the relationship between Foster and BOC.

Finally, BOC has introduced no evidence that any BOC officer or supervisory agent gave Foster instructions, directions, or supervision concerning the performance of his duties; or that BOC otherwise had any right to control Foster's activities on behalf of the bank. Nor is there any evidence that inferentially establishes such a right to control. Therefore, a reasonable jury could only conclude that Foster acted as an independent contractor *for* BOC through the services of CNCIFC and not as an "employee" *of* BOC as required under the bonds.[4]

III

In conclusion, we REVERSE the district court's denial of Aetna's motion for JNOV because BOC has failed to present sufficient evidence from which a jury could reasonably conclude that BOC controlled or could have controlled the activities of Foster. We therefore REMAND this case to the district court with directions to enter judgment for Aetna. Because of this disposition, we need not address Aetna's remaining arguments.

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[3] In fact, BOC opposed Aetna's efforts to assert an alter ego defense, because a finding of alter ego status would have resulted in no coverage under the bonds. *See FDIC v. Aetna Casualty & Sur. Co.*, 947 F.2d 196, 208-10 (6th Cir. 1991) (remanding to the district court for consideration under Tennessee law of Aetna's claim that Butcher was the alter ego of a failed Tennessee bank).

[4] It should also be noted that Foster's position as a BOC director does not provide a basis of recovery since the bonds specifically excepted losses suffered from the fraudulent acts of directors who were not also employees of BOC.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. C-85-0013-BG(M)

BANK OF CUMBERLAND,
Plaintiff

v.

AETNA CASUALTY AND SURETY COMPANY,
Defendant

MEMORANDUM OPINION

On February 23, 1990, the jury returned a verdict in this case in favor of the Bank of Cumberland for the amount of $2,233,000.00. The Court previously ruled during an in-Chambers conference, that, in the event Bank of Cumberland should succeed in the within action, it is also entitled to prejudgment interest as a matter of right. This Memorandum Opinion is in support of the Court's ruling and the Judgment entered of even date herewith. The Court also finds that the Bank of Cumberland is entitled to post-judgment interest as will also be addressed below.

When the Federal Court's jurisdiction rests on diversity of citizenship, as in the case at bar, an award of prejudgment interest is made in accordance with Kentucky law. *Hale v. Life Insurance Company of North America*, 795 F.2d 22, 24 (6th Cir. 1986), *cert. denied* 480 U.S. 919; *reh. denied* 481 U.S. 1034.

The case of *State Farm Mutual Automobile Insurance Company v. Reeder*, 763 S.W.2d 116 (KY. 1988) guides this Court in its determination that, as the Bank of Cumberland's claim is on an uncontested liquidated amount, it is thereby entitled to prejudgment interest as a matter of right. The *Reeder* court held, in pertinent part, as follows:

> ". . . that interest shall be awarded on a claim, or that portion of a claim that constitutes an uncontested 'liquidated' amount, even though the balance due is in litigation. . . ."

Reeder, 763 S.W.2d at 119.

The holding in *Reeder* as to prejudgment interest is a reflection of the rule long-standing in Kentucky that prejudgment interest is a matter of right on a liquidated claim. *Henderson Cotton Manufacturing Company v. Lowell Machine Shops*, 7 S.W. 142, 145 (1888); *Congoleum-Nairn v. M. Livingston & Company*, 78 S.W.2d 781, 785 (1935); *General Accident Fire & Insurance Corporation v. Judd*, 400 S.W.2d 685, 687 (KY. 1966). In accordance with the Court's previous in-Chambers ruling where it was determined that the claim of Bank of Cumberland is on a liquidated amount, Kentucky law guides this Court to reach a decision that Bank of Cumberland is entitled to prejudgment interest on its liquidated claim as a matter of right.

The Sixth Circuit has suggested that the rate to be applied in regard to prejudgment interest remains essentially one for the discretion of the trial judge. *EEOC v. Wooster Brush Company Relief Association*, 727 F.2d 566, at 579 (6th Cir. 1984). Although this is discretionary for the trial judge, *Wooster*, *supra*, strongly suggests that the correct rate to be applied is that stated in Amendment of 28 U.S.C. § 1961(a). The *Wooster* court states:

> Undoubtedly in the future, district courts may be influenced by the Congressional wisdom expressed

> in the Amendment of 28 U.S.C. § 1961(a), but we do not think that they are invariably compelled to adopt the statutory post-judgment rate in determining prejudgment interest.

Wooster, 727 F.2d at 579. As such, this Court will heed to the Sixth Circuit's suggestion and the rate to be applied will be that rate specified by 28 U.S.C. § 1961(a). The pertinent part of Section 1961(a) states as follows:

> Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States Treasury Bills set immediately prior to the date of the judgment.

The appropriate yield in effect at this time is 7.97%. As such, that percentage yield shall be applied as the rate of prejudgment interest from July 17, 1984, until the date of this Judgment.

The Court will further award post-judgment interest on the amount of the liquidated claim from the date of the entry of this Judgment in accordance with the rate specified by Title 28, U.S.C. § 1961(a). *Compressed Gas Corp., Inc. v. U. S. Steel Corp.*, 857 F.2d 346, at 353 (6th Cir. 1988). This interest shall be calculated from the date of the entry of this Judgment until paid.

Furthermore, the decision to award post-judgment interest on accrued prejudgment interest is entirely within the discretion of the trial court. *Rudd Construction Equipment Company v. Clark Equipment Company*, 735 F.2d 974 (6th Cir. 1984). As such, the Court will award post-judgment interest on the amount of the prejudgment interest that accrued from July 17, 1984, until the date of Judgment, at the rate specified in 28 U.S.C. § 1961(a), until paid.

A Judgment in accordance with this Memorandum Opinion will be entered of even date herewith.

Dated this 8 day of March, 1990.

/s/ Ronald E. Meredith
RONALD E. MEREDITH
Judge, U. S. District Court

[Entered 3-9-90]

cc: Counsel of Record
Catron & Thomas
Luther
Kerrick
Miller & Pritchett
Diamond, McDonald & Wisdom
& Jakubowicz
Foster

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. C-85-0013-BG(M)

BANK OF CUMBERLAND,
Plaintiff

v.

AETNA CASUALTY AND SURETY COMPANY,
Defendant

MEMORANDUM OPINION AND ORDER

Pending before the Court are various post-trial motions. Specifically, there is before the Court Bank of Cumberland's (hereinafter "BOC") Bill of Costs, Aetna's consolidated motion and brief to alter or amend judgment, Aetna's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, Aetna's motion for leave to file a brief in excess of forty pages, BOC's motion to strike, Aetna's motion for leave to file surreply brief, and BOC's motion to file and supplemental affidavit: bill of costs.

BOC's bill of costs will be discussed, infra. As to the remaining motions hereinabove mentioned, this Court makes the following determinations. Aetna's motion for leave to file a brief in excess of forty pages is granted. BOC's motion to strike is denied. Aetna's motion to file a surreply brief is granted. BOC's motion to file and supplemental affidavit: bill of costs is granted. Aetna's consolidated motion and brief to alter or amend judgment is denied, and Aetna's motion for judgment not-

withstanding the verdict or, in the alternative, for a new trial, is denied.

Aetna has made numerous objections to BOC's bill of costs. BOC does admit, in its reply to Aetna's objections, that the item of fees for copies of the deposition of Emmett J. Foster was erroneously listed and should be deleted. As such, that item shall be subtracted from the total bill of costs submitted by BOC, which total was initially listed at $17,341.58. This erroneously listed item, stated under the heading, 5. *Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case*, amounts to $60.60.

BOC has submitted its bill of costs to recover for items and expenses reasonably and necessarily incurred in the preparation for and trial of the above-captioned action pursuant to 28 U.S.C. § 1920 and F.R.C.P. 54(d). 28 U.S.C. § 1920 provides for the taxation of costs as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

In accordance with the granting of BOC's motion to file and supplemental affidavit: bill of costs, BOC is entitled to an additional $111.30 for the original transcript of the deposition of Robert Shober. The Court hereby rules that BOC is not entitled to certain of the items requested in its original Bill of Costs. These items are specified in the computation that follows:

Total request of BOC's Bill of Costs:	$17,341.58
Original Transcript of Deposition of Robert Shober	+111.30
Erroneously listed item, "5. *Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case*—Emmett Foster (202)"	(60.60)
"1. *Fees of the Clerk and/or Marshall (Service of Summons, Subpoenas for Depositions and Trial)*"	
6-01-87 Assoc. Press—Subpoena for Emmett Foster	(16.00)
8-02-89 U.S. District Court—Subpoena for Emmett Foster	(20.00)
8-03-89 Paul Weinstein—Subpoena for David Crabtree	(30.00)
9-05-89 Robertson, Williams, Ingram and Overbey—Subpoena for Richard Childs	(75.00)
4-16-86 "U.S. District Court, Knoxville"	(48.50)
"6. *Costs Incidental to Taking of Depositions.*"	(8,444.12)
"7. *Other Costs Itemized As Follows:*	
A. Preparation of trial exhibits.	
B. Telecopied and Expedited Mail Charges.	(721.03)
	$ 8,086.13

The Court determines that Bank of Cumberland is entitled to recover as costs, pursuant to 28 U.S.C. § 1920, the amount of $8,086.13.

IT IS SO ORDERED.

This is a final and appealable Order.

Dated this 8 day of August, 1990.

/s/ Ronald E. Meredith
RONALD E. MEREDITH
Judge, U. S. District Court

[Entered 8/13/90]

cc: Counsel of Record
Catron & Thomas
Miller & Pritchett
Luther
Kerrick
Diamond

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 90-6160

BANK OF CUMBERLAND,
Plaintiff-Appellee,

v.

AETNA CASUALTY & SURETY COMPANY,
Defendant Third Party
Plaintiff-Appellant

MYRTLE S. BLAKLEY, executrix of the Estate of
Alton E. Blakley, deceased; *et al.*,
Third party Defendants,

On Appeal from the United States District Court
for the Western District of Kentucky at Bowling Green

Before: Nelson and Suhrheinrich, Circuit Judges; Harvey, Senior District Judge

JUDGMENT

[Filed Feb. 11, 1992]

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed and the case is remanded in accordance with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

A True Copy.
Attest:

/s/ Diane Schnur
Deputy Clerk

Issued as Mandate: 5/14/92

COSTS: $4,654.79

Filing Fee ..... $
Printing ..... $
Total ..... $

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

Civil Action No. C-85-0013-BG(M)

RONALD E. MEREDITH, Judge

BANK OF CUMBERLAND,
Plaintiff

v.

AETNA CASUALTY AND SURETY COMPANY,
Defendant

☒ *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

This action came on for trial before the Court and a jury, Honorable Ronald E. Meredith, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Bank of Cumberland, recover of the defendant, Aetna Casualty and Surety Company, the sum of $1,525,000.00, with interest thereon at the rate of 7.97% until paid.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Bank of Cumberland, recover from the defendant, Aetna Casualty and Surety Company, prejudgment interest at the legal rate of 7.97% on the sum of

$1,525,000.00, from July 17, 1984, to the date of this Judgment, and thereafter on the accrued prejudgment interest at the rate of 7.97% until the Judgment is paid.

A Memorandum Opinion in accordance with this Judgment will be entered of even date herewith.

This is a final and appealable Judgment.

[Entered 3-9-90]

JESSE W. GRIDER
Clerk

/s/ Margie Duvall
MARGIE DUVALL
(By) Deputy Clerk

Date 3/9/90

INTEREST CALCULATIONS ON BOC JUDGMENT

$1,525,000.00 (original judgment)
7.97% interest, compounded annually
7-17-84 through 3-9-90:

	$1,525,000.00
7-17-84 through 7-16-85: 365 days at $333.00/day = $121,542.50	$1,646,542.50
7-17-85 through 7-16-86: 365 days at $359.54/day = $131,229.44	$1,777,771.94
7-17-86 through 7-16-87: 365 days at $388.19/day = $141,688.43	$1,919,460.37
7-17-87 through 7-16-88: 365 days at $419.13/day = $152,981.00	$2,072,441.37
7-17-88 through 7-16-89: 365 days at $452.53/day = $165,173.58	$2,237,614.95
7-16-89 through 3-9-90: 237 days at $488.60/day = $115,798.20	
TOTAL AMOUNT OF JUDGMENT WITH INTEREST:	$2,353,413.15

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 90-6160

BANK OF CUMBERLAND,
Plaintiff-Appellee

v.

AETNA CASUALTY AND SURETY COMPANY,
Defendant-Appellant

MYRTLE S. BLAKLEY, executrix of the Estate of Alton E. Blakley, deceased; *et al.*,
Third party

ORDER

[Filed May 6, 1992]

BEFORE: NELSON and SUHRHEINRICH, Circuit Judges; HARVEY, District Judge.*

Upon consideration of the petition for rehearing filed by the appellee, and further considering the response thereto,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* The Honorable James Harvey, District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX G

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut 06115

[Aetna Emblem]

DECLARATIONS

[Aetna Emblem]

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06156

(A Stock Company, Herein Called the Underwriter)

BANKERS BLANKET BOND
STANDARD FORM NO. 24

FOR

1. NAMED INSURED AND ADDRESS

Bank of Cumberland
Main & Church Streets
Burkesville, KY 42717

BOND NUMBER 46 F 687 BCA

2. BOND PERIOD

From 12:01 a.m. on December 16, 1981 to 12:01 a.m. on the effective date of the termination or cancellation of this Bond, standard time at the Principal Address as to each of said dates.

Item 3. Limit of Liability and Deductible Amount—

Subject to Sections 3 and 11 hereof, the Limit of Liability is $525,000.00 and the Deductible Amount is $5,000.00.

Provided, however, that if any amounts are inserted below opposite specified Insuring Agreements or Coverage, those amounts shall be controlling. Any amount set forth below shall be part of and not in addition to amounts set forth above. (If an Insuring Agreement or Coverage is to be deleted, insert "Not Covered.")

Amount applicable to:	Limit of Liability	Deductible
Insuring Agreement (D)— FORGERY OF ALTERATION	$50,000.00	$5,000.00
Insuring Agreement (E)— SECURITIES	$50,000.00	$5,000.00
Misplacement, Mysterious Unexplainable Disappearance Coverage in Insuring Agreement (B)— ON PREMISES	$	

If "Not Covered" is inserted above opposite any specified Insuring Agreement or Coverage, such Insuring Agreement or Coverage and any other reference thereto in this bond shall be deemed to be deleted therefrom.

Item 4. Offices or Premises Covered—All the Insured's offices or premises in existence at the time this bond becomes effective are covered under this bond except the offices or premises located as follows: N/A

Item 5. The liability of the Underwriter is subject to the terms of the following riders attached hereto: SR 6024a

Item 6. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or canceling prior bond(s) or policy(ies) No.(s) N/A such termination or cancellation to be effective as of the time this bond becomes effective.

Signed, sealed and dated (enter below)
12-9-81

THE AETNA CASUALTY AND SURETY COMPANY

By:

/s/ S. W. Ardison
S. W. ARDISON
Attorney-in-Fact

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06156

[Aetna Emblem]

BANKERS BLANKET BOND
STANDARD FORM NO. 24

The Underwriter, in consideration of an agreed premium, subject to the Declarations made a part hereof, Insuring Agreements, General Agreements, Conditions and Limitations and other terms hereof, agrees to idemnity the Insured for:

INSURING AGREEMENTS

FIDELITY

(A) Loss resulting directly from dishonest or fraudulent acts of an Employee committed alone or in collusion with others.

Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent

(a) to cause the Insured to sustain such loss, and

(b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

ON PREMISES

(B) (1) Loss of Property resulting directly from

(a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or

(b) theft, false pretenses, common law or statutory larceny, committed by a person present in an office or on the premises of the Insured.

while the Property is lodged or deposited within offices or premises located anywhere.

(2) Loss of or damage to

(a) furnishings, fixtures, supplies or equipment within an office of the Insured covered under this bond resulting directly from larceny or theft in, or by burglary or robbery of, such office, or attempt thereat, or by vandalism or malicious mischief, or

(b) such office resulting from larceny or theft in, or by burglary or robbery of such office or attempt threat, or to the interior of such office by vandalism or malicious mischief.

provided that

(i) the Insured is the owner of such furnishings, fixtures, supplies, equipment, or office or is liable for such loss or damage, and

(ii) the loss is not caused by fire.

IN TRANSIT

(C) Loss of Property resulting directly from robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or otherwise made away with, and damage thereto or destruction thereof, while the Property is in the custody of a person designated by the Insured to act as its messenger (or a person acting as messenger or custodian during an

emergency arising from the incapacity of such designated messenger) and while the Property is in transit anywhere, such transit to begin immediately upon receipt of such Property by said messenger and to end immediately upon delivery to the designated recipient or its agent.

FORGERY OR ALTERATION

(D) Loss resulting directly from

(1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt), Acceptance, withdrawal order, receipt for the withdrawal of Property, Certificate of Deposit or Letter of Credit.

(2) transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear a signature which is a Forgery or have been altered without the knowledge and consent of such customer or banking institution. Telegraphic, cable or teletype instructions or advices, as aforesaid, exclusive of transmissions of electronic funds transfer systems, sent by a person other than the said customer or banking institution purporting to send such instructions or advices shall be deemed to bear a signature which is a Forgery.

A mechanically reproduced facsimile signature is treated the same as a handwritten signature.

SECURITIES

(E) Loss resulting directly from the Insured having, in good faith, for its own account or for the account of others.

(1) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original

(a) Security,

(b) Document of Title.

(c) deed, mortgage or other instrument conveying title to, or creating or discharging a lien upon, real property.

(d) Certificate of Origin or Title

(e) Evidence of Debt.

(f) corporate, partnership or personal Guarantee, or

(g) Security Agreement

which

(i) bears a signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent, registrar, acceptor, surety, guarantor, or of any person signing in any other capacity which is a Forgery, or

(ii) is altered, or

(iii) is lost or stolen;

(2) guaranteed in writing or witnessed any signature upon any transfer, assignment, bill of sale, power of attorney, Guarantee, endorsement or any items listed in (a) through (g) above;

(3) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any item listed in (a) through (d) above which is a Counterfeit.

Actual physical possession of the items listed in (a) through (g) above by the Insured, its correspondent bank or other authorized representative, is a condition prece-

dent to the Insured's having relied on the faith of, or otherwise acted upon, such items.

A mechanically reproduced facsimile signature it treated the same as a handwritten signature.

COUNTERFEIT CURRENCY

(F) Loss resulting directly from the Insured, in good faith, of any Counterfeit or altered Money of the United States of America or Canada.

GENERAL AGREEMENTS

NOMINEES

A. Loss sustained by any nominee organized by the Insured for the purpose of handling certain of its business transactions and composed exclusively of its offices, clerks or other employees shall, for all the purposes of this bond and whether or not any partner of such nominee is implicated in such loss, be deemed to be loss sustained by the insured.

ADDITIONAL OFFICES OR EMPLOYEES— CONSOLIDATION, MERGER OR PURCHASE OR ASSETS—NOTICE

B. If the Insured shall, while this bond is in force, establish any additional offices, other than by consolidation or merger with, or purchase of assets of, another institution, such offices shall be automatically covered hereunder from the date of such establishment [line illegible]
payment of additional premium for the remainder of the premium period.

If the Insured shall, while this bond is in force, consolidate or merge with, or purchase assets of, another institution, the Insured shall not have such coverage as is afforded under this bond for loss which

(a) has occurred or will occur in offices or premises, or

(b) has been caused or will be caused by an employee or employees of an institution, or

(c) has arisen or will arise out of the assets acquired by the Insured as a result of such consolidation, merger or purchase of assets; unless the Insured shall

(i) give the Underwriter written notice of the proposed consolidation, merger or purchase of assets at least 60 days prior to the proposed effective date of the consolidation, merger or purchase of assets, and [line illegible]
coverage provided by this bond of such additional offices or premises. Employers and other employee, and

(iii) pay to the Underwriter an additional premium computed pro rata from the date of such consolidation, merger or purchase of assets to the end of the current premium period.

CHANGE OF CONTROL—NOTICE

C. When the Insured learns of a transfer of its outstanding voting stock which results in a change in control of the Insured, it shall within 30 days give written notice to the Underwriter setting forth

(a) the names of the transferors and transferees (or the names of the beneficial owners if the shares are registered in another name), and

(b) the total number of shares owned by the transferors and the transferees (or the beneficial owners), both immediately before and after the transfer, and

(c) the total number of outstanding shares of voting stock.

As used in this General Agreement, control means the power to determine the management or policy of the In-

sured by virtue of voting stock ownership. A change in ownership of voting stock which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten per cent (10%) or more of the outstanding voting stock of the Insured shall be presumed to result in a change of control for the purpose of the required notice.

Failure to give the required notice shall result in termination of coverage of this bond, effective upon the date of stock transfer, for any loss in which any transferee is implicated.

WARRANTY

D. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that is true to the best of the knowledge and belief of the person making the statement.

JOINT INSURED

E. If two or more Insureds are covered under this bond, the first named insured shall act for all Insureds. Payment by the Underwriter to the first named Insured of loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases to be covered under this bond, the Insured next named shall therefore be considered as the first named Insured. Knowledge possessed or discovery made by any Insured shall constitute knowledge or discovery by all Insureds for all purposes of this bond. The liability of the Underwriter for loss or losses sustained by all Insureds shall not exceed the amount for which the Underwriter would have been liable had all such loss or losses been sustained by one Insured.

COURT COSTS AND ATTORNEYS' FEES

F. The Underwriter shall indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a collectible loss under this bond in excess of any Deductible Amount.

The Insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding and at the request of the Underwriter shall furnish it with copies of all pleadings and other papers therein. At the Underwriter's election the Insured shall permit the Underwriter to conduct the defense of such suit or legal proceeding, in the Insured's name, through attorneys of the Underwriter's selection. In such event, the Insured shall give all reasonable information and assistance which the Underwriter shall deem necessary to the defense of such suit or legal proceeding.

If the amount of the Insured's liability or alleged liability is greater than the amount recoverable under this bond, or if a Deductible Amount is applicable, or both, the liability of the Underwriter under this General Agreement is limited to the propotrion of court costs and attorneys' fees incurred and paid by the Insured or by the Underwriter that the amount recoverable under this bond bears to the total of such amount plus the amount which is not so recoverable. Such indemnity shall be a part of the Limit of Liability for the applicable Insuring Agreement or Coverage.

If the Underwriter pays court costs and attorneys' fees in excess of its proportionate share of such costs and fees, the Insured shall promptly reimburse the Underwriter for such excess.

CONDITIONS AND LIMITATIONS

DEFINITIONS

Section 1. As used in this bond:

(a) Acceptance means a draft which the drawee has, by signature written thereon, engaged to honor as presented.

(b) Certificate of Deposit means an acknowledgment in writing by a financial institution of receipt of Money with an engagement to repay it.

(c) Certificate of Origin or Title means a document issued by a manufacturer of personal property or a governmental agency evidencing the ownership of the personal property and by which ownership is transferred.

(d) Counterfeit means an imitation which is intended to deceive and to be taken as an original.

(e) Document of Title means a bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers and must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(f) Employee means

(1) an officer or other employee of the Insured, while employed in, at, or by any of the Insured's offices or premises covered hereunder, and a guest student pursuing studies or duties in any of said offices or premises;

(2) an attorney retained by the Insured and an employee of such attorney while either is performing legal services for the Insured;

(3) a person provided by an employment contractor to perform employee duties for the Insured under the Insured's supervision at any of the Insured's offices or premises covered hereunder;

(4) an employee of any institution merged or consolidated with the Insured prior to the effective date of this bond; and

(5) each natural person, partnership or corporation autorized by the Insured to perform services as data processor of checks or other accounting records of the Insured herein called Processor. (Each such Processor, and the partners, officers and employees of such Processor shall, collectively, be deemed to be one Employee, for all the purposes of this bond, excepting, however, the second paragraph of Section 12. A Federal Reserve Bank or clearing house shall not be construed to be a processor.)

(g) Evidence of Debt means an instrument, including a Negotiatable Instrument, executed by a customer of the Insured and held by the Insured which in the regular course of business is treated as evidencing the customer's debt to the Insured.

(h) Forgery means the signing of the name of another with intent

[line illegible]

without authority, in any capacity, for any purpose.

(i) Guarantee means a written undertaking obligating the signer to pay the debt of another to the Insured or its assignee or to a financial institution from which the In-

sured has purchased participation in the debt, if the debt is not paid in accordance with its terms.

(j) Letter of Credit means an engagement in writing by a bank or other person made at the request of a customer that the bank or other person will honor drafts or other demands for payment upon compliance with the conditions specified in the Letter of Credit.

(k) Money means a medium of exchange in current use authorized or adopted by a domestic or foreign government as a part of its currency.

(l) Negotiable Instrument means any writing

(1) signed by the maker or drawer; and

(2) containing an unconditional promise or order to pay a sum certain in Money and no other promise, order, obligation or power given by the maker or drawer; and

(3) is payable on demand or at a definite time; and

(4) is payable to order or bearer.

(m) Property means Money, Securities, Negotiable Instruments, Certificates of Deposit, Documents of Title, Acceptances, Evidences of Debt, Security Agreements, withdrawal orders, Certificates of Origin or Title, Letters of Credit, insurance policies, abstracts of title, deeds and mortgages on real estate, revenue and other stamps, tokens, unsold state lottery tickets, books of account and other records whether recorded in writing or electronically, gems, jewelry, precious metals in bars or ingots, and tangible items of personal property which are not hereinbefore enumerated.

(n) Security means an instrument which

(1) is issued in bearer or registered form; and

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(o) Security Agreement means an agreement which creates an interest in personal property or fixtures and which secures payment or performance of an obligation.

EXCLUSIONS

Section 2. This bond does not cover:

(a) loss resulting directly or indirectly from Forgery or alteration, except when covered under Insuring Agreements (A), (D), (E) or (F).

(b) loss due to riot or civil commotion outside the United States of America and Canada; or loss due to military, naval or usurped power war or insurrection unless loss occurs in transit in the circumstances recited in Insuring Agreement (C), and unless, when such

[line illegible]

commotion, military, naval or usurp———or, war or insurrection on the part of tany person acting for the ——— initiating such transit.

(c) loss resulting directly or indirectly from the effects of nuclear fission or fusion or radioactivity; provided, however, that this paragraph shall not apply to loss resulting from industrial uses of nuclear energy;

(d) loss resulting directly or indirectly from any acts of any director of the Insured other than one employed

as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the board of directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured;

(e) loss resulting directly or indirectly from the complete or partial non-payment of, or default upon, any loan or transaction in the nature of a loan or extension of credit, whether involving the Insured as a lender or as a borrower, including the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or Evidences of Debt, whether such loan or transaction was procured in good faith or through trick, artifice, fraud or false pretenses, except when covered under Insuring Agreements (A), (D) or (E);

(f) loss of Property contained in customers' safe deposit boxes, except when the Insured is legally liable therefor and loss is covered under Insuring Agreement (A);

(g) loss through cashing or paying forged or altered travelers' checks or travelers' checks bearing forged endorsements, except when covered under Insuring Agreement (A); or loss of unsold travelers' checks or unsold money orders placed in the custody of the Insured with authority to sell, unless (a) the Insured is legally liable for such loss and (b) such checks or money orders are later paid or honored by the drawer thereof, except when covered under Insuring Agreement (A);

(h) loss caused by an Employee, except when covered under Insuring Agreement (A);

(i) loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, whether or not represented by any indebtedness or balance shown to

be due the Insured on any customer's account, actual or fictitious, and notwithstanding any act or omission relating to such trading, indebtedness, or balance, except when covered under Insuring Agreements (D) or (E);

(j) shortage in any teller's cash due to error, regardless of the amount of such shortage; and any shortage in any teller's cash which is not in excess of the normal shortage in the tellers' cash in the office where such shortage shall occur shall be presumed to be due to error;

(k) loss resulting directly or indirectly from the use of credit, debit, charge, access, convenience, identification or other cards

(1) in obtaining credit, or

(2) in gaining access to automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, or

(3) in gaining access to point of sale terminals, customer-bank communication terminals, or similar electronic terminals of electronic funds transfer systems,

whether such cards were issued, or purport to have been issued by the Insured or by anyone other than the Insured, except when covered under Insuring Agreement (A);

(l) loss involving automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, unless such automated mechanical devices are situated within an office of the Insured which is permanently staffed by an Employee whose duties are those usually assigned to a bank teller, even though public access is from outside the confines of such office, but in

no event shall the Underwriter be liable for loss (including loss of Property)

(1) as a result of damage to such automated mechanical devices from vandalism or malicious mischief perpetrated from outside such office, or

(2) as a result of failure of such automated mechanical devices to function properly, or

(3) through misplacement or mysterious unexplainable disappearance while such Property is located within any such automated mechanical devices,

except when covered under Insuring Agreement (A);

(m) loss through the surrender of Property away from an office of the Insured as a result of a threat

(1) to do bodily harm to any person, except loss of Property in transit in the custody of any person acting as messenger provided that when such transit was initiated there was no knowledge by the Insured of any such threat, or

(2) to do damage to the premises or property of the Insured

except when covered under Insuring Agreement (A);

(n) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving erroneous credits to such account, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the Insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A).

(o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit

[line illegible]

Forgery or any offi———, unless such payments or withdrawals are physically receiv— which depositor or representative of such depositor who is ——— office of the Insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A).

(p) loss resulting directly or indirectly from counterfeiting, except when covered under Insuring Agreements (A), (E) or (F);

(q) loss of any tangible item of personal property which is not specifically enumerated in the paragraph defining Property and for which the Insured is legally liable, if such property is specifically insured by other insurance of any kind and in any amount obtained by the Insured, and in any event, loss of such property occurring more than 60 days after the Insured shall have become aware that it is liable for the safekeeping of such property, except when covered under Insuring Agreements (A) or (B) (2);

(r) loss or loss of Property in or from an office or premises listed in Item 4 of the Declarations;

(s) loss of Property while in the mail or with a carrier for hire (other than an armored motor vehicle company), except when covered under Insuring Agreement (A);

(t) potential income, including but not limited to interest and dividends, not realized by the Insured;

(u) damages of any type for which the Insured is legally liable, except direct compensatory damages arising from a loss covered under this bond;

(v) costs, fees and other expenses incurred by the Insured in establishing the existence of or amount of loss covered under this bond;

(w) indirect or consequential loss of any nature.

LIMIT OF LIABILITY
NON-ACCUMULATION OF LIABILITY

Section 3. The total liability of the Underwriter under this bond on account of loss, including court costs and attorneys' fees,

(a) caused by any one act of burglary, robbery or attempt threat, in which no Employee is implicated, or

(b) with respect to any one unintentional or negligent act or omission on the part of any person (whether an Employee or not) resulting in damage to or destruction or misplacement of Property, or

(c) other than those specified in (a) and (b) preceding, caused by all acts or omissions by any person (whether an Employee or not) or all acts or omissions in which such person is implicated, or

(d) other than those specified in (a), (b) and (c) preceding, resulting from any one casualty or event,

is limited to the Limit of Liability stated in Item 3 of the Declarations of this bond or amendment thereto or to the amount of the applicable coverage, if such amount be smaller, without regard to the total amount of such loss.

Subject to the foregoing, payment of loss shall not reduce liability for other losses, whenever sustained.

Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter shall not be cumulative in amounts from year to year or from period to period.

If any loss is covered under more than one Insuring Agreement or Coverage the maximum payable for such loss shall not exceed the largest amount available under any one Insuring Agreement or Coverage.

DISCOVERY

Section 4. This bond applies to loss discovered by the Insured during the bond period. Discovery occurs when the Insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred, even though the exact amount or details of loss may not then be known.

Notice to the Insured of an actual or potential claim by a third party which alleges that the Insured is liable under circumstances, which, if true, would create a loss under this bond constitutes such discovery.

NOTICE/PROOF—LEGAL PROCEEDINGS

Section 5.

(a) At the earliest practicable moment, not to exceed 30 days, after discovery of loss, the Insured shall give the Underwriter notice thereof.

(b) Within 6 months after such discovery, the Insured shall furnish to the Underwriter proof of loss, duly sworn to, with full particulars.

(c) Lost Securities listed in a proof of loss shall be identified by certificate or bond numbers if the Securities were issued therewith.

(d) Legal proceedings for the recovery of any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is filed with the Underwriter or after the expiration of 24 months from the discovery of such loss, except that any action or proceeding to recover hereunder on account of any judgment against the Insured in any suit mentioned in General Agreement F, or — recover attorneys' fees paid in any such suit, shall be brought within 24 months from the date upon which the judgment and such suit shall become final.

(e) If any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to equal the minimum period of limitation

[line illegible]

(f) This bond affords coverage only ———— of the insured. No such action or legal proceedings shall be———— hereunder by any one other than the named Insured.

VALUATION

Section 6.

Any loss of Money, or loss payable in Money, shall be paid, at the option of the Insured, in the Money of the country in which the loss was sustained or in the United States of America dollar equivalent thereof determined at the rate of exchange at the time of payment of such loss.

Securities

The Underwriter shall settle in kind its liability under this bond on account of a loss of any Securities or, at the option of the Insured, shall pay to the Insured the cost of replacing such Securities, determined by the market value thereof at the time of such settlement. In case of a loss of subscription, conversion or redemption privileges through the misplacement or loss of Securities, the amount of such loss shall be the value of such privileges immediately preceding the expiration thereof. If such Securities cannot be replaced or have no quoted market value, or if such privileges have no quoted market value shall be determined by agreement or arbitration.

If the applicable coverage of this bond is subject to a Deductible Amount and/or is not sufficient in amount to indemnify the Insured in full for the loss of Securities for which claim is made hereunder, the liability of the Underwriter under this bond is limited to the payment for, or

the duplication of, so much of such securities as has a value equal to the amount of such applicable coverage.

Books of Account and Other Records

In case of loss of, or damage to, any books of account or other records used by the Insured in its business, the Underwriter shall be liable under this bond only if such books or records are actually reproduced and then for not more than the cost of the blank books, blank pages or other materials plus the cost of labor for the actual transcription or copying of data which shall have been furnished by the Insured in order to reproduce such books and other records.

Property other than Money, Securities or Records

In case of loss of, or damage to, any Property other than Money, Securities, books of account or other records, or damage covered under Insuring Agreement (B)(2), the Underwriter shall not be liable for more than the actual cash value of such Property, or of items covered under Insuring Agreement (B)(2). The Underwriter may, at its election, pay the actual cash value of, replace or repair such property. Disagreement between the Underwriter and the Insured as to the cash value or as to the adequacy of repair or replacement shall be resolved by arbitration.

ASSIGNMENT—SUBROGATION—
RECOVERY—COOPERATION

Section 7.

(a) In the event of payment under this bond, the Insured shall deliver, if so requested by the Underwriter, an assignment of such of the Insured's rights, title and interest and causes of action as it has against any person or entity to the extent of the loss payment.

(b) In the event of payment under this bond, the Underwriter shall be subrogated to the Insured's rights of recovery therefor against any person or entity to the extent of such payment.

(c) Recoveries, whether effected by the Underwriter or by the Insured, shall be applied net of the expense of such recovery first to the satisfaction of the Insured's loss in excess of the amount paid under this bond, secondly, to the Underwriter as reimbursement of amounts paid in settlement of the Insured's claim, and thirdly, to the Insured in satisfaction of any Deductible Amount. Recovery on account of loss of Securities as set forth in the second paragraph of Section 6 or recovery from reinsurance and/or indemnity of the Underwriter shall not be deemed a recovery as used herein.

(d) Upon the Underwriter's request and at reasonable times and places designated by the Underwriter the Insured shall

(1) submit to examination by the Underwriter and subscribe to the same under oath; and

(2) produce for the Underwriter's examination all pertinent records; and

(3) cooperate with the Underwriter in all matters pertaining to the loss.

(e) The Insured shall execute all papers and render assistance to secure to the Underwriter the rights and causes of action provided for herein. The Insured shall do nothing after discovery of loss to prejudice such rights or causes of action.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

Section 8. With respect to any loss set forth in subsection (c) of Section 3 of this bond which is recoverable or recovered in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to

any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount earned hereunder on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss if the latter amount be the larger.

If the coverage of [?illegible?] supersedes in whole or in part the coverage of any [?illegible?] or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancelation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 9. Coverage afforded hereunder shall apply only as excess over any valid and collectible insurance or indemnity obtained by the Insured, or by one other than the Insured on Property subject to exclusion (q), or by an armored motor vehicle company, or by another entity on whose premises the loss occurred or which employed the person causing the loss or the messenger conveying the Property involved.

OWNERSHIP

Section 10. This bond shall apply to loss of Property (1) owned by the Insured, (2) held by the Insured in

any capacity, or (3) for which the Insured is legally liable. This bond shall be for the sole use and benefit of the Insured named in the Declarations.

DEDUCTIBLE AMOUNT

Section 11. The Underwriter shall be liable hereunder only for the amount by which any loss exceeds the Deductible Amount for the Insuring Agreement or Coverage applicable to such loss, subject to the Limit of Liability for such Agreement or Coverage.

The Insured shall, in the time and in the manner prescribed in this bond, give the Underwriter notice of any loss of the kind covered by the terms of this bond, whether or not the Underwriter is liable therefor, and upon the request of the Underwriter shall file with it a brief statement giving the particulars concerning such loss.

TERMINATION OR CANCELATION

Section 12. This bond shall be deemed terminated or canceled as an entirety—(a) 60 days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the Insured to terminate or cancel this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution. The Underwriter shall, on request, refund to the Insured the unearned premium, computed pro rata, if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Underwriter, or if terminated or canceled as provided in sub-section (c) or (d) of this paragraph. The Underwriter shall refund to the Insured the unearned premium computed at short rates if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Insured.

This bond shall be deemed terminated or canceled as to any Employee or any partner, officer or employee of any Processor—(a) as soon as any Insured, or any director or officer not in collusion with such person, shall learn of any dishonest or fraudulent act committed by such person at any time against the Insured or any other person or entity, without prejudice to the loss of any Property then in transit in the custody of such person, or (b) 15 days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond as to such person.

Termination of the bond as to any Insured terminates liability for any loss sustained by such Insured which is discovered after the effective date of such termination.

RIGHTS AFTER TERMINATION OR CANCELATION

Section 13. At any time prior to the termination or cancelation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of 12 months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancelation and shall pay an additional premium therefor.

Upon receipt of such notice from the Insured, the Underwriter shall give its written consent thereto; provided, however, that such additional period of time shall terminate immediately

(a) on the effective date of any other insurance obtained by the Insured, its successor in business or any other party, replacing in whole or in part the insurance afforded by this bond, whether or not such other insurance provides coverage for loss sustained prior to its effective date, or

(b) upon any takeover of the Insured's business by any State or Federal official or agency, or by any receiver or liquidator, acting or appointed for this purpose.

without the necessity of the Underwriter giving notice of such termination. In the event that such additional period of time is terminated, as provided above, the Underwriter shall refund any unearned premium.

SEVERAL LINES ILLEGIBLE ....-

In witness whereof, the Underwriter has caused this bond to be executed on the Declarations page.

In Witness Whereof, we have caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by our authorized representative.

/s/ William O. Bailey
President

/s/ Stephen B. Middlebrook
Secretary

RIDER

To be attached to and form part of Bankers Blanket Bond, Standard Form No. 24, No. 46 F 687 BCA in favor of Bank of Cumberland

It is agreed that:

1. The attached bond is amended by adding the following immediately after subdivision (2) of Insuring Agreement (D):

> "(3) the Insured's having debited or credited a customer's checking or savings account on the faith of any electronic instructions or advices directed to the Insured by or through an electronic funds transfer system of an automated clearing house association which is a member of the National Automated Clearing House Association and purporting to have originated at an Originating Depository Financial Institution or automated clearing house, provided that such electronic instructions or advices prove to have been fraudulently transmitted by or through such electronic funds transfer system. Electronic instructions or advices shall not include telephoned instructions or advices."

2. This rider shall become effective as of 12:01 a.m. on December 16, 1981 standard time as specified in the attached bond.

ELECRONIC FUNDS TRANSFER SYSTEM RIDER

FOR USE WITH BANKERS BLANKET BOND STANDARD FORM NO. 24. "DISCOVERY" OR "LOSS SUSTAINED" FORMS TO AMEND INSURING AGREEMENT (D) TO PROVIDE COVERAGE FOR EFTS OPERATION REVISED TO JULY, 1980.

APPENDIX H

[AETNA EMBLEM]

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut 06115

[AETNA EMBLEM]

EXCESS BANK EMPLOYEE
DISHONESTY BLANKET BOND
Standard Form No. 28 (Discovery Form)
Revised to February, 1970

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

(A Stock Company, herein called the Underwriter)

Bond No. 46 F 688 BCA

DECLARATIONS

Item 1. Name of Insured (herein called Insured):

Bank of Cumberland

Principal Address: Main & Church Streets
Burkesville, KY 42717

Item 2. Bond Period: from noon on December 16, 1981 to noon on the effective date of the cancellation or termination of this bond, standard time at the Principal Address as to each of said dates.

Item 3. Limit of Liability—

Subject to Section 6 hereof, the Limit of Liability is $1,000,000.00

Deductible Amount: $530,000.00

Item 4. The liability of the Underwriter is subject to the terms of the following riders attached hereto:

SR 5923b
SR 6014a
SR 6020
SR 6030a
SR 6059
SR 6081

Item 5. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or canceling prior bond(s) or policy(ies) No.(s) N/A such termination or cancellation to be effective as of the time this bond becomes effective.

THE AETNA CASUALTY AND SURETY COMPANY

Signed, sealed and dated (enter below)
12-9-81

By /s/ S. W. Ardison
S. W. ARDISON
Attorney-in-Fact

INSURING AGREEMENT

The Underwriter, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations, and other terms of this bond, agrees to indemnify and hold harmless the Insured from and against loss sustained by the Insured at any time but discovered during the Bond period, including loss of money, securities or other property held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor, through any dishonest or fradulent act committed anywhere by any of the Employees, acting anyone or in collusion with others, to an amount not exceeding the Limit of Liability stated in Item 3 of the Declarations; provided, however, that the Underwriters shall not be liable under this bond on account of loss through acts committed by an Employee or in which such Employee is concerned or implicated, unless the amount of such loss, after deducting the net amount of all reimbursement and recovery obtained or made by the Insured, other than from any bond or policy of insurance issued by a surety or insurance company and covering such loss, or by the Underwriter on account thereof prior to payment by the Underwriter of such loss, shall exceed, in the aggregate, the Deductible Amount set forth in Item 3 of the Declarations and then for such excess only, but in no event for more than the said Limit of Liability.

GENERAL AGREEMENTS

NOMINEES

A. Loss sustained by any nominee organized by the Insured for the purpose of handling certain of its business transactions and composed exclusively of its officers, clerks or other employees shall, for all the purposes of this bond and whether or not any partner of such nominee is concerned or implicated in such loss, be deemed to be loss sustained by the Insured.

ADDITIONAL INSURED—
CONSOLIDATION OR MERGER

B. If, through adding one or more institutions as Insured under this bond or through consolidation or merger with, or purchase or assets of, some other institution, the Insured's deposits shall be so increased that there is a change in the bank deposit group, as set forth below, applicable to the Insured, a premium adjustment shall be made for the remainder of the unexpired premium period in accordance with the customary rating procedures of the Underwriter and in addition, the Deductible Amount, set forth in Item 3 of the Declarations, shall, as of the time such institutions are added as Insured or such consolidation, merger or purchase occurs, be deemed changed to the amount set opposite such applicable bank deposit group and the Deductible Amount as so changed shall thereafter be the Deductible Amount as used in this bond; provided such Deductible Amount is larger than the Deductible Amount set forth in Item 3 of the Declarations.

Group	Deposits	Amount
1	less than $750,000	$ 50,000
2	$750,000 up to $1,499,999	75,000
3	$1,500,000 up to $1,999,999	90,000
4	$2,000,000 up to $2,999,999	120,000
5	$3,000,000 up to $4,999,999	150,000
6	$5,000,000 up to $7,499,999	175,000
7	$7,500,000 up to $9,999,999	200,000
8	$10,000,000 up to $14,999,999	250,000
9	$15,000,000 up to $19,999,999	300,000
10	$20,000,000 up to $24,999,999	350,000
11	$25,000,000 up to $34,999,999	450,000
12	$35,000,000 up to $49,999,999	550,000
13	$50,000,000 up to $74,999,999	700,000
14	$75,000,000 up to $99,999,999	850,000
15	$100,000,000 up to $149,999,999	1,200,000
16	$150,000,000 up to $249,999,999	1,700,000
17	$250,000,000 up to $499,999,999	2,500,000
18	$500,000,000 up to $999,999,999	4,000,000
19	$1,000,000,000 up to $1,999,999,999	6,000,000
20	$2,000,000,000 and over	6,000,000

THE FOREGOING INSURING AGREEMENT AND GENERAL AGREEMENTS ARE SUBJECT TO THE FOLLOWING CONDITIONS AND LIMITATIONS:

DEFINITION OF EMPLOYEE

Section 1. As Used in this bond, "Employee" shall be deemed to mean, respectively, one or more of the Insured's officers, clerks, and other employees while employed in, at or by any of the Insured's offices, established or to be established, which are located in the United States of America and Canada, and one or more of the officers, clerks and other employees of any predecessor of the Insured whose principal assets are acquired by the Insured by consolidation or merger with, or purchase of assets of, such predecessor, and attorneys retained by the Insured to perform legal services for the Insured and the employees of such attorneys while such attorneys or the employees of such attorneys are performing such services for the Insured, and Guest Students pursuing their studies or duties in any of said offices.

EXCLUSION

Section 2. This bond does not cover any loss resulting from any act or acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the board of directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured.

WARRANTY

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whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is

true to the best of the knowledge and belief of the person making the statement.

LOSS—NOTICE—PROOF—LEGAL PROCEEDINGS

Section 4. This bond is for the use and benefit only of the Insured named in the Declarations and the Underwriter shall not be liable hereunder for loss sustained by anyone other than the Insured unless the Insured, in its sole discretion and at its option, shall include such loss in the Insured's proof of loss. At the earliest practicable moment after discovery of any loss hereunder the Insured shall give the Underwriter written notice thereof and shall also within six months after such discovery furnish to the Underwriter affirmative proof of loss with full particulars. Legal proceedings for recovery of any loss hereunder shall not be brought prior to the expiration of sixty days after such proof of loss is filed with the Underwriter nor after the expiration of twenty-four months from the discovery of such loss. If any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

SALVAGE

[line illegible]

plus the Deductible Amount, the Insured shall be entitled to all recoveries made after payment by the Underwriter of loss covered by this bond, except from suretyship, issuance, reinsurance, security or indemnity taken by or for the benefit of the Underwriter, by whomsoever made, less the actual cost of effecting such recoveries, until reimbused for such excess loss; and any remainder, or, if there be no such excess loss, any such recoveries shall be applied first in reimbursement of the Underwriter and thereafter in reimbursement of the Insured for that part of such loss within such Deductible Amount.

LIMIT OF LIABILITY

Section 6. Payment of loss under this bond shall not reduce the liability of the Underwriter under this bond for other losses whenever sustained: PROVIDED, however, that the total liability of the Underwriter under this bond on account of all loss caused by any Employee or in which such Employee is concerned or implicated is limited to the Limit of Liability stated in Item 3 of the Declarations, irrespective of the total amount of such loss.

NON-ACCUMULATION OF LIABILITY

Section 7. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter under this bond with respect to any loss specified in the PROVIDED cause of Section 6 of this bond shall not be cumulative in amounts from year to year or from period to period.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

Section 8. With respect to loss caused by any Employee or in which such Employee is concerned or implicated and for which the Underwriter is liable under this bond and under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried under this bond on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and condition thereof, for any such loss if the latter amount be the larger.

If the coverage of this bond supersedes in whole or in part the coverage of any other bond or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 9. If the Insured carries or holds any other insurance or indemnity covering any loss covered by this bond, the Underwriter shall be liable hereunder only for that part of such loss which is in excess of the amount recoverable or recovered from such other insurance or indemnity. In no event shall the Underwriter be liable for more than the amount of coverage of this bond applicable to such loss, subject, nevertheless, to Section 6 of this bond.

TERMINATION OR CANCELLATION

Section 10. This bond shall be deemed terminated or canceled as an entirety—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the Insured to terminate or cancel this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution. The Underwriter shall, on request, refund to the Insured the unearned premium,

computed pro rata, if this bond be terminated or canceled or reduced by notice from, or at the instance of the Underwriter, or if terminated or canceled as provided in sub-section (c) or (d) of this paragraph. The Underwriter shall refund to the Insured the unearned premium computed at customary short rates if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Insured.

This bond shall be deemed terminated or canceled as to any Employee—(a) as soon as the Insured shall learn of any dishonest or fraudulent act on the part of such Employee, without prejudice to the loss of any property of the Insured or in which the Insured has an interest then in transit in the custody of such Employee, or (b) fifteen days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond as to such Employee.

RIGHTS AFTER TERMINATION OR CANCELLATION

Section 11. At any time prior to the termination or cancellation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of twelve months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancellation and shall pay an additional premium therefor. If this bond is terminated or canceled as an entirety by reason of the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, such receiver or other liquidator or State or Federal officials shall have the rights of the Insured and be subject to the same limitations as set forth in this paragraph provided that such rights are exercised by notice to the Underwriter within thirty days after such Insured is taken over by such receiver or other liquidator or State or Federal officials and provided, further, that

such Insured has not previously exercised such rights. Upon receipt of such notice from the Insured or from such receiver or other liquidator or State or Federal officials, the Underwriter shall give its written consent thereto; provided, however, that such additional period of time shall terminate forthwith on the effective date of any other insurance.

(a) obtained by the Insured or its successors in business, other than such receiver or other liquidator or State or Federal officials, replacing in whole or in part the insurance afforded by this bond, whether or not such other insurance provides coverage for loss sustained prior to its effective date, or

(b) obtained by such receiver, liquidator or State or Federal officials replacing in whole or in part the insurance afforded by this bond but only if such other insurance provides coverage to some extent for loss sustained prior to its effective date, and

in the event that such additional period of time is terminated, as herein provided, the Underwriter shall refund any unearned premium.

In witness whereof, the Underwriter has caused this bond to be executed on the Declarations page.

RIDER

To be attached to and form part of Blanket Bond, Standard Form No. 28, No. 46 F 688 BCA in favor of Bank of Cumberland

It is agreed that:

1. Anything in the attached bond to the contrary notwithstanding, the attached bond shall be deemed terminated or canceled as an entirety sixty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel such bond.

2. This rider shall become effective as of noon on December 16, 1981.

CANCELATION RIDER

FOR USE WITH ALL FINANCIAL INSTITUTION BLANKET BONDS, "DISCOVERY" OR "LOSS SUSTAINED" FORM, TO PROVIDE FOR SIXTY DAYS NOTICE OF CANCELATION WHEN THE BOND IS CANCELED AS AN ENTIRETY BY THE UNDERWRITER.

NOTE: NOT APPLICABLE TO STANDARD FORM NO. 10.

REVISED TO APRIL, 1974.

RIDER

To be attached to and form of Blanket Bond, Standard Form No. 28, No. 46 F 688 BCA in favor of Bank of Cumberland.

It is agreed that:

1. The attached bond is amended by adding after General Agreement B in the General Agreements section of the bond the following:

NOTICE OF CHANGE OF CONTROL

B.1 Upon the Insured's obtaining knowledge of a transfer of its outstanding voting stock which results in a change in control of the Insured, the Insured shall within thirty days of such knowledge give written notice to the Underwriter setting forth,

1. the names of the transferors and transferees (or the names of the beneficial owners if the shares are registered in another name),
2. the total number of shares owned by the transferors and the transferees (or the beneficial owners), both immediately before and after the transfer, and
3. the total number of outstanding shares of voting stock.

As used in this General Agreement, control means the power to determine the management or policy of the Insured by virtue of voting stock ownership. A change in ownership of voting stock which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten per cent (10%) or more of the oustanding voting stock of the Insured shall be presumed to result

in a change of control for the purpose of the required notice.

Failure to give the required notice shall result in termination of coverage of this bond, effective upon the date of stock transfer for any loss in which any transferee is concerned or implicated.

2. This rider shall become effective as of noon on December 16, 1981 standard time as specified in the attached bond.

Accepted: Signature waived

NOTICE OF CHANGE OF CONTROL RIDER

FOR USE WITH BLANKET BONDS, STANDARD FORMS NO. 24, "DISCOVERY" OR "LOSS SUSTAINED" AND NO. 28. EXCESS BANK EMPLOYEE DISHONESTY BLANKET BOND (DISCOVERY FORM) TO REQUIRE NOTICE TO THE UNDERWRITER OF A CHANGE OF CONTROL OF THE INSURED.

REVISED TO JULY, 1976.

RIDER

To be attached to and form part of Blanket Bond, Standard Form No. 28, No. 46 F 688 BCA in favor of Bank of Cumberland.

It is agreed that:

1. The attached bond is hereby amended:

   (a) by inserting the word "direct" preceding the word "loss" in the third line of the Insuring Agreement, and

   (b) by inserting as an additional paragraph in the Insuring Agreement the following:

"Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent:

(a) to cause the Insured to sustain such loss; and

(b) to obtain financial benefit for the Employee, or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment."

2. In addition to the existing Exclusion(s) in the attached bond, the Underwriter shall not be liable for:

   (i) Potential income, including but not limited to interest and dividends, not realized by the Insured because of a loss covered under this bond.

   (ii) All damages of any type for which the Insured is legally liable, except direct compensatory damages arising from a loss covered under this bond.

(iii) All costs and other expenses incurred by the Insured in establishing the existence of or amount of loss covered under this bond.

3. This rider shall become effective as of noon on December 16, 1981 standard time as specified in the attached bond.

Accepted: Signature waived

DEFINITION OF DISHONESTY—EXCLUSIONS

FOR USE WITH EXCESS BANK EMPLOYEE DISHONESTY BLANKET BOND. STANDARD FORM NO. 28 (DISCOVERY FORM) TO REVISE THE INSURING AGREEMENT AND ADD CERTAIN EXCLUSIONS.

ADOPTED APRIL, 1976.

RIDER

To be attached to and form part of Blanket Bond, Standard Form No. 28, No. 46 F 688 BCA in favor of Bank of Cumberland.

It is agreed that:

1. The Underwriter shall not be liable under the attached bond for any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, and notwithstanding any act or omission on the part of any Employee in connection with any account relating to such trading, indebtedness, or balance.

In regard to Blanket Bonds Nos. 5, 22 and 24, this subsection shall not apply to Insuring Agreement (D) or (E) if coverage is carried thereunder.

2. This rider applies to loss sustained at any time but discovered after 12:01 a.m. on December 16, 1981 standard time as specified in the attached bond.

Accepted: Signature waived

DELETE TRADING LOSS RIDER—DISCOVERY FORM

FOR USE WITH BLANKET BONDS, STANDARD FORMS NOS. 5, 22, 24 AND 28, "DISCOVERY" FORMS, TO DELETE TRADING LOSS COVERAGE.

REVISED TO JUNE, 1978.

EFFECTIVE TIME: RIDER

ENDORSEMENT 203
(Edition of January, 1977)

To be attached to and form part of Policy or Bond No. 46 F 688 BCA issued to or in favor of Bank of Cumberland.

The time of inception and the time of expiration, termination or cancellation of this policy or bond and of any schedule, endorsement or rider attached or to be attached shall be 12:01 a.m. standard time.

To the exent that coverage in this policy or bond replaces coverage in other policies or bonds terminating at noon standard time on the inception date of this policy or bond, coverage under this policy or bond shall not become effective until such other coverage is terminated.

Effective as of December 16, 1981.

FOR USE WITH ANY BOND AND THE COMPREHENSIVE 3-D AND BLANKET CRIME POLICIES TO CHANGE THE TIME OF INCEPTION OR TERMINATION FROM NOON TO 12:01 A.M.

ADOPTED JANUARY, 1977.

In Witness Whereof, we have caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by our authorized representative.

/s/ Stephen B. Middlebrook
Secretary

/s/ William O. Bailey
President

To be attached to and form part of Excess Blanket Bond, Standard Form No. 28 46 F 688 BCA in favor of Bank of Cumberland.

It is agreed that:

1. The attached bond is amended by inserting the following as the title and first paragraph of General Agreement B in the General Agreements section of the bond:

ADDITIONAL INSURED—CONSOLIDATION, MERGER OR PURCHASE OF ASSETS—NOTICE

B. If the Insured shall, while this bond is in force, merge or consolidate with, or purchase the assets of, another institution, the Insured shall not have such coverage as is afforded under this bond for loss which has been caused or will be caused by an employee or employees acquired by the Insured as a result of such merger, consolidation or purchase of assets; unless the Insured shall:

(i) give to the Underwriter written notice of the proposed merger, consolidation or purchase of assets at least 60 days prior to the proposed effective date of the merger, consolidation or purchase of assets, and

(ii) obtain the writen consent of the Underwriter to extend the coverage provided by this bond to such other institution.

2. The attached bond is further amended by substituting the chart below in lieu of the chart forming the final portion of the second paragraph of General Agreement B:

Group	Deposits	Amount
1	less than $750,000	$ 250,000
2	$750,000 up to $1,499,999	250,000
3	$1,500,000 up to $1,999,999	250,000
4	$2,000,000 up to $2,999,999	250,000
5	$3,000,000 up to $4,999,999	250,000
6	$5,000,000 up to $7,499,999	250,000
7	$7,500,000 up to $9,999,999	300,000
8	$10,000,000 up to $14,999,999	375,000
9	$15,000,000 up to $19,999,999	450,000
10	$20,000,000 up to $24,999,999	525,000
11	$25,000,000 up to $34,999,999	675,000
12	$35,000,000 up to $49,999,999	825,000
13	$50,000,000 up to $74,999,999	1,050,000
14	$75,000,000 up to $99,999,999	1,275,000
15	$100,000,000 up to $149,999,999	1,800,000
16	$150,000,000 up to $249,999,999	2,500,000
17	$250,000,000 up to $499,999,999	3,750,000
18	$500,000,000 up to $999,999,999	6,000,000
19	$1,000,000,000 up to $1,999,999,999	9,000,000
20	$2,000,000,000 and over	9,000,000

3. The attached bond is further amended by inserting after the phrase "America and Canada, and" in the definition of "Employee", the following words:

" , if coverage is extended under the terms of the first paragraph of General Agreement B."

4. This rider shall become effective as of 12:01 a.m. on December 16, 1981 standard time as specified in the attached bond.

Accepted: Signature waived.

NOTICE OF MERGER, CONSOLIDATION OR PURCHASE OF ASSETS RIDER

FOR USE WITH EXCESS BANK EMPLOYEE DISHONESTY BLANKET BOND, STANDARD FORM NO. 28 (DISCOVERY FORM) TO REQUIRE NOTICE TO THE UNDERWRITER OF THE INSURED'S MERGER, CONSOLIDATION, OR PURCHASE OF ASSETS OF ANOTHER INSTITUTION AND TO CHANGE THE TABLE OF UNDERLYING AMOUNTS.

ADOPTED DECEMBER, 1978.

APPENDIX I

DEFINITION OF EMPLOYEE

In this case, the Bank of Cumberland seeks to recover under the Bond for alleged dishonest and/or fraudulent acts on the part of Emmett Foster.

The Bond provides a definition of the term "employee." Under the Bond, "Employee means an officer or other employee of the (Bank), while employed in, at or by any of the [Bank's] offices or premises."

You must determine from all facts and circumstances in evidence whether an employment relationship existed between the Bank and Mr. Foster.

In determining whether Mr. Foster was an employee of the Bank, you may consider whether or not he was drawing a salary or received a fee for his services. However, the payment of a fee or salary is not necessary to give rise to an employment relationship. By the same token, payment of a fee or salary in and of itself does not create an employment relationship. You may also consider other factors such as whether he was designated as an employee, whether he performed duties consistent with the duties of an employee, whether he acted with the direct authority of the Bank, whether he carried out specific duties or functions at the Bank, how frequently he was on the Bank's premises and the types of functions he fulfilled while on the Bank's premises. In addition, you may consider any other facts which you deem relevant to a determination of whether Mr. Foster was an employee of the Bank.

CONTRACT ACTION

I instruct you that this lawsuit is based upon an instrument known as a Bankers Blanket Bond.

Such a Bond is nothing more or less than a contract that exists between Aetna and Bank of Cumberland

which provides that, under certain circumstances, the parties will do certain things, based upon the happening of certain events, all of which are spelled out and defined by the terms of the contract.

It is therefor the terms of the Bond, or contract, that control the rights of the parties to this lawsuit, and it is your primary obligation to apply these contractual terms to the facts as you find them to exist, all of which you will do within the framework of this Court's charge regarding the contractual terms and the applicable law.

C & C INTERSTATE FINANCIAL CORPORATION

You have heard testimony with respect to an organization known as C & C Interstate Financial Corporation.

In this connection I instruct you that, in view of the fact that C & C Interstate Financial Corporation was not an employee of Bank of Cumberland as defined by the bond, any action or failure to act on the part of C & C Interstate Financial Corporation could not, under these circumstances, form the basis for a recovery against Aetna.

I further instruct you that, if you find that Emmett Foster was functioning as an official of C & C Interstate Financial Corporation and while acting in that capacity may have been engaged in some dishonest act that was directed toward Bank of Cumberland, that act could not become the basis of a recovery against Aetna, since only the actions of an employee of Bank of Cumberland, while performing duties within the scope of that employment, would be covered under the terms of the bond in question.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts

from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.